

(28,094)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. XXXX 224

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF
CALIFORNIA AND O. J. BURTON, PETITIONERS,

vs.

JOHN BARTON PAYNE, AS AGENT, &c. (LOS ANGELES
& SALT LAKE RAILWAY COMPANY).

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT
OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO, OF
THE STATE OF CALIFORNIA.

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1 Supreme Court of the United States, October Term, 1920.

No. —.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA
and O. J. BURTON

VS.

JOHN BARTON PAYNE, as Agent under Section 206, Transportation
Act, 1920.

On Petition for Writ of Certiorari to the District Court of Appeal of
the State of California, Second Appellate District, Division Two.

2 *Opinion of District Court of Appeal.*

Second Appellate District, Division Two, November 26, 1920.

Civil, No. 3296.

JOHN BARTON PAYNE, as Agent under Section 206, Subdivision (b)
of the Transportation Act, 1920 (Substituted for Walker D.
Hines), Petitioner,

V.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA
and O. J. BURTON, Respondents.

- [1] Workmen's Compensation Act—Injury to Workman in Railroad repair shops—engine engaged in Interstate Commerce—Lack of jurisdiction of Industrial Accident Commission.—An employee engaged in repairing an engine in the general shops of the railroad company in this state; which engine had been used several months exclusively in interstate commerce, and which had been placed in the shops for general overhauling, whereupon it was the intention to return it to its regular service, and which was in fact so returned, is engaged in work so intimately connected with interstate commerce as practically to be a part of it, and the Industrial Accident Commission has no jurisdiction to make an award of compensation for injuries to such employee received while tapping the boiler of the engine.

Application for Certiorari to Review an Order of the Industrial Accident Commission Awarding Compensation for Injuries.

Award Annulled.

On Petition for Writ of Review.

For Petitioner—Fred E. Pettit, Jr., E. E. Bennett.

For Respondents—A. E. Graupner; Warren H. Pillsbury, of Counsel.

This proceeding was brought to review the action of the Industrial Accident Commission of California in awarding compensation to one O. J. Burton for injuries sustained by him in the line of his employment under Walker D. Hines, director general of railroads, operating the Los Angeles and Salt Lake railroad.

On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad. On the 19th of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California.

3 was testified that the trip to San Pedro was a part of the process of "breaking in" after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.

The sole question presented for our consideration is: Was the engine, at the time of the accident, engaged in interstate commerce

within the meaning of the Federal Employers' Liability Act (35 U. S. Stats., 65)?

The answer to this simple proposition is rendered difficult by the apparent conflict of decisions of the various courts, federal and state, which have been called upon to apply the law to the facts in issue in particular cases. It is complicated by reason of the fact that no fixed rule has been established by the Supreme Court of the United States for the application of the statute. It has held that each case must be decided in the light of the particular facts with a view to determining whether, at the time of the injury, the employer is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof. (*New York C. & H. R. Co. v. Carr*, 238 U. S. 260.) Where the employer is engaged in both intrastate and interstate commerce, and the instrumentalities are used indiscriminately in both, the line of demarkation between the two classes of business is exceedingly difficult to trace. A résumé of some of the decisions will serve to illustrate this point.

In *Louisville & Nashville R. Co. v. Parker*, 242 U. S. 13, the employee was engaged in switching a car not moving in interstate commerce from one track to another, for the purpose of reaching and moving an interstate car; and it was held that he was engaged in interstate commerce. The court says: "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, and doing the act for the purpose of furthering the later work."

New York C. R. Co. v. Carr, supra, was a case where two cars carrying interstate freight were uncoupled from an interstate train and backed into a siding, where the employee was injured. We quote from the decision: "The matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefit of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

In the case of *Erie R. Co. v. Winfield*, 244 U. S. 170, an employee was in charge of a switch engine which was used in switching cars about in the yard, especially to and from a transfer station, some cars containing interstate freight, others intrastate, and still others carrying both classes. After completing his day's work, he put his engine away and started to leave the yard. While crossing a track on his way out, he was struck by an engine and killed. It was held that, as his work was particularly interstate, and his leaving the yard was a necessary incident to his employment, he was at the time engaged in interstate commerce within the purview of the federal act.

New York C. R. Co. v. Porter, 249 U. S. 168, determined that a workman engaged in removing snow from tracks used for the transportation of interstate and intrastate commerce was entitled to compensation under the federal law.

In *Philadelphia B. & W. R. Co. v. Smith*, 250 U. S. 101, the em-

ployee was the cook of a construction crew which was employed in repairing bridges at different places along the line. The court stated that as he was actually assisting the bridge carpenters by keeping their bed and board close to their place of work, he was engaged in interstate commerce.

Pederson v. Delaware L. & W. R. Co., 229 U. S. 146, decided that an employee who was carrying bolts to be used in repairing an interstate railroad, and was injured by an interstate train while performing that duty, was within the terms of the federal statute.

Shanks v. Delaware L. & W. R. Co., 239 U. S. 556, enunciates the principle that a workman employed in removing and installing fixtures in a machine shop which is conducted for repairing locomotives used in both interstate and intrastate transportation is not entitled to the benefit of the federal act. The court in its opinion says: "The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation."

In the case of *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, the workman was employed with a crew in switching cars of coal to sheds, where it was placed in chutes, thence to be used to supply coal to engines engaged in both classes of transportation. The court held that he was not in interstate commerce, stating that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

The above citations will suffice to indicate the subtle distinctions which have been drawn by the Supreme Court of the United States in interpreting and applying the Federal Employers' Liability Act.

Coming now to the decisions of our own supreme court construing these authorities, we encounter a direct conflict which adds to the difficulty of reaching a satisfactory solution of the problem.

In the case of *Southern Pacific Co. v. Pillsbury*, 170 Cal. 782, the Industrial Accident Commission of California had assumed jurisdiction, under substantially the following facts: A workman named Ruth was repairing a switch engine which had been withdrawn from service in the yard at Roseville Junction, California, where some seventy per cent of the switching was interstate commerce work. While thus engaged, Ruth received injuries resulting in his death. The accident occurred during the time the engine was in the round-house undergoing repairs, and three days before it was restored to service. Our supreme court annulled the award, after discussing the decisions of the federal courts, some of which we have cited. On May 21, 1917, without filing an opinion, the Supreme Court of the United States denied a petition for a writ of certiorari whereby it was sought to review the decision of the state court.

On January 8, 1917, the Supreme Court of the United States rendered an opinion in the case of *Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, from which we quote: "The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled

both interstate and intrastate commerce, and it was so used after plaintiff's injury.' The last time before the injury was on October

18, when it pulled a freight train into Marshalltown, and it
5 was used again on October 21, after the accident, to pull a freight train out from the same place. That is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to any kind of traffic, and it does not appear that *this engine was destined especially to anything more definite than such business as it might be needed for*. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen*. At the moment it was not engaged in either. Its character as an instrument of commerce depends upon its employment at the time, and not upon *remote probabilities or upon accidental later events*." (Italics ours.)

On the authority of this Winters case, our supreme court, in Hines v. Industrial Acc. Com., 60 Cal. Dec. 365, filed October 4, 1920, affirmed an award to one Brizzolara, under circumstances somewhat similar to those in the Ruth case, supra. The finding of the commission in the Brizzolara case was as follows: "That at the time of said injury and death said employee was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That when in service, said switch engine was used in both interstate and intrastate traffic. That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent of the whole." After quoting from the decisions of the United States Supreme Court, the opinion proceeds to state that the ruling in the Ruth case is at variance with the holding in the Winters case, and that the Ruth case, therefore, cannot be considered as controlling, notwithstanding that the Ruth case was affirmed by the United States Supreme Court some four months after the Winters case was decided.

Some of the other adjudications of our supreme court are illuminating upon this intricate problem. It has been held that a watchman at a railroad crossing used for both interstate and intrastate traffic is engaged in interstate business while employed in keeping the track clear of obstructions in order to facilitate the passage of interstate trains. (Southern Pacific Co. v. Industrial Acc. Com. [Rolfe case], 174 Cal. 8; Southern Pacific Co. v. Industrial Acc. Com. [Smith case], 174 Cal. 16.) An electric lineman employed in the removal of an overhead telephone wire which had fallen on the trolley wire used by a railroad for furnishing electric power for the operation of cars of the railroad's interstate and intrastate passenger system, was engaged in interstate commerce, as he was then engaged directly in removing an obstruction to the operation of an instrumentality in actual use for purposes of such commerce. (Southern Pacific Co. v. Industrial Acc. Com. [Covell case], 174 Cal. 19.)

In the case of Southern Pacific Co. v. Industrial Acc. Com., 178 Cal. 20, one Butler was killed by an electric shock received while he

was wiping insulators on the main power line of an interstate and intrastate system, between the power house and substations. The electrical energy was generated at this power house and conveyed in an alternating current of high voltage to the substations, there converted and transformed to a direct current of reduced voltage, thence passed to the trolley wires, and from there to the motors on the cars. Our supreme court applied the principle of the Harrington case, supra, and decided that the work being done by Butler was analogous to the situation of an employee loading coal chutes for the supply of interstate engines, and held that Butler's employment was too remote from interstate commerce to bring him within the federal statute.

This action was reversed by the Supreme Court of the United States (40 Sup. Ct. Rep. 130), the court saying: "Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it."

The cases which most closely parallel the one we have under consideration are found in the decisions of the circuit courts of appeals; and though they are not expressions of the court of last resort, nevertheless they may guide the action of the state courts in determining the applicability of the federal statute.

Law v. Illinois Cent. R. Co., 208 Fed. 869, was decided by the circuit court of appeals of the sixth circuit. A boilermaker's helper was injured in the shops of the railroad company at Memphis, Tenn., while assisting the boilermaker in repairing a freight engine regularly used in interstate commerce. The engine was in the shop for what is called "roundhouse overhauling," and had been dismantled at least twenty-one days before the accident. Up to the time it was taken to the shop it had been regularly used in interstate commerce, was destined to return thereto on completion of the repairs, and did so return the day following the accident. In the opinion holding the federal act applicable to the facts, the court propounds the following pertinent interrogatories: "Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days' temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in the roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character?" Further quoting from the opinion: "As held in the Pederson case, the work of keeping the instrumentalities used in interstate commerce (which would in-

clude engines) in proper state of repair while thus used is so clearly related to such commerce as to be in practice and in legal contemplation a part of it."

In *Northern Pacific R. Co. v. Maerkl*, 198 Fed. 1, the circuit court of appeals of the ninth circuit held that an employee engaged at the railway shops in making repairs upon a refrigerator car theretofore used indiscriminately in intrastate and interstate commerce, and intended again to be so used when repaired, was one of the instruments of interstate commerce.

Some general statements in the opinion in the *Brizzolara* case, supra, might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the *Winters* case, supra, upon which they purport to be based. The *Winters* case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch engine involved in the *Brizzolara* case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence.

It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the *Winters* case or the *Brizzolara* case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the *Parker* case, supra, "the purpose controls, and the business is interstate." Its future use was not dependent upon "remote probabilities or accidental later events," but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

[1] In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled.

We concur:

FINLAYSON, P. J.
THOMAS, J.

WELLER, J.

8 In the District Court of Appeal of the State of California,
Second Appellate District.

WALKER D. HINES, Director General of Railroads, United States
Railroad Administration, Operating Los Angeles & Salt Lake Rail-
road, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION and O. J. BURTON, Respondents.

Petition for a Writ of Review.

To the Honorable the District Court of Appeal of the State of Cal-
ifornia, Second Appellate District:

The petitioner above named, respectfully prays for a writ of review,
by this its verified petition, and in this behalf sets forth the following
facts and causes for the issuance of the writ, viz:

I.

That your petitioner, Walker D. Hines, is Director General of
Railroads, United States Railroad Administration, Operating Los
Angeles & Salt Lake Railroad.

II.

That the Los Angeles & Salt Lake Railroad Company, a corpora-
tion, has secured from the Industrial Accident Commission of the
State of California, a certificate of consent to self-insure, and that
said Los Angeles & Salt Lake Railroad Company thereafter
9 deposited with the State Treasurer of the State of California
bond approved by said Industrial Accident Commission, and
is now carrying its own insurance; that the rights and liabilities un-
der said bond and certificate have accrued to your Petitioner herein
by operation of law.

III.

That the application for adjustment of claim herein was filed
or about the 3rd day of July, 1919, and served on the defendant on
about the 5th day of July, 1919. In said application, Los Angeles
& Salt Lake Railroad Company, a corporation, was named as a party
defendant, but under the findings and award of this Commission
the proceedings were dismissed as to said corporation, and the latter
will therefore no longer appear as a party.

The answer of Walker D. Hines, within the time allowed by law
and the extension thereof lawfully granted, was served on the 10th
day of July, and filed on the 11th day of July, 1919. A hearing
therein was had before F. W. Fellows, Referee, on the 22nd day of
July, 1919, at the office of the Commission in the City of Los Angeles.

Angeles, California. Findings and award were filed on the 17th day of December, 1919, and the defendant received a copy thereof by mail on or about the 19th day of December, 1919.

IV.

That so far as is necessary to refer thereto, the application reads as follows:

"II.

* * * * *

That a dispute has arisen concerning jurisdiction, and defendants allege that applicant's injury arose out of and in the course of employment incidental to interstate commerce. Defendants' contention is incorrect in that the engine upon which applicant was working at the time of said injury was withdrawn from service for repairs for a period of approximately 30 days and was so withdrawn at the time of the said injury.

III.

* * * * *

4. Place of injury. Employer's Los Angeles Shops.

10 5. Nature of work on which injured person was engaged at time of injury. Drilling and tapping boiler of engine.

6. How did injury occur? (Describe in detail.) While doing as aforesaid, a piece of steel lodged in applicant's left eye."

V.

That thereafter on the said 11th day of July, 1919, your petitioner filed its answer to said application; that, so far as is necessary to refer thereto, said answer reads as follows:

* * * * *

"That the line of the defendant Railroad Company, now in the possession, use, operation and control of the defendant Walker D. Hines, runs in and between the States of Utah, Nevada and California, and said defendant Walker D. Hines is engaged as a common carrier of freight and passengers in interstate commerce; that said applicant at the time of the alleged injury was engaged in interstate commerce, to wit: in repairing a locomotive used by said defendant Walker D. Hines in interstate commerce; that this Honorable Commission, therefore, has no jurisdiction in this matter."

* * * * *

Wherefore, your defendants pray that said application be dismissed, and for such further relief as to this Commission may seem just."

VI.

That after said hearing on July 22nd, 1919, Findings and Award were made by the Commission, a copy of which Findings and award were received by petitioner herein on the 19th day of December, 1919.

VII.

That so far as necessary to consider said Findings and Award, the Findings read as follows:

* * * * *

"3. That at the time of said injury the employee was not engaged in any of the occupations or employments excluded by Section 8 of the Workmen's Compensation, Insurance and Safety Act of 1917, from the provisions of said Act, and the employee and the employer were subject to the compensation provisions of said Act and to the jurisdiction of this Commission.

* * * * *

9. That the engine upon which he was at work had been theretofore used in interstate commerce, but during the period from the 19th day of December, 1918, to the 21st day of February, 1919, said engine was withdrawn from any and all service for repairs, and was not then an instrument of or engaged in any commerce, and the employee was not engaged in interstate commerce, and both
11 employer and employee were subject to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act and to the jurisdiction of this Commission."

VIII.

The award made by said Commission was made in favor of the applicant and against this Petitioner for the sum of \$181.68, payable forthwith, and the further sum of \$20.16 a week, beginning with the 23rd day of July, 1919, until the termination of said disability, or the further order of this Commission.

IX.

That thereafter, to wit, on the 2nd day of January, 1920, your Petitioner filed his Petition for a re-hearing before the Industrial Accident Commission upon the following grounds:

1. That the Commission acted without, or in excess of its powers.
2. The evidence does not justify the findings of Fact.
3. The Findings of Fact do not justify the order, decision or award.

And in said petition for rehearing your petitioner fully and particularly set forth the grounds and the reasons upon which he claims that the Commission acted without, or in excess of its powers; that the evidence does not justify the findings of fact; that the findings of fact do not justify the order, decision or award.

X.

That thereafter, to wit, on the 22nd day of January, 1920, the said Industrial Accident Commission denied the petition of your petitioner for re-hearing.

XI.

That unless said award is set aside or modified by this Honorable Court, it will be enforced against your petitioner under a writ off execution upon a judgment which will be entered and docketed as provided in said Workmen's Compensation, Insurance and Safety Act.

XII.

That unless said award is set aside or modified, your petitioner will be deprived of its property without due process of law in violation of Section 113, Article I, of the Constitution of the State of California, and in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States of America.

That your Petitioner claims the benefit and protection of the afore-said provisions of the Constitution of the State of California and of the Amendments to the Constitution of the United States of America.

XIII.

That your Petitioner has not the right to appeal from said decision and award of said Industrial Accident Commission, and has no plain, speedy or adequate remedy other than by a Writ of Review; that your Petitioner is a party beneficially interested in this proceeding, and that the names of the parties interested whose rights would be affected by this proceeding are, your Petitioner and the Respondents herein.

XIV.

In support of this Petition for Writ of Review, your Petitioner avers that said Industrial Accident Commission in rendering said decision and entering said award, acted without, or in excess of, its powers, and that the evidence does not justify the findings of fact, and the findings of fact do not justify the award, order or decision.

Argument in Support of Petition for a Writ of Review.

Certain facts were established by stipulation, and it is unnecessary to refer to them herein.

13 The sole issue in this case, and the one upon which the petition for a Writ of Review is based, is to ascertain whether, at the time of the injury, the Petitioner and the Respondent Burton were engaged in interstate commerce.

O. J. BURTON,
Respondent.

The evidence of the respondent is of very little assistance to us, so far as the sole issue in the case is concerned. He testified that he was working on the boiler of the engine, which he believed was No. 3673; that it had been in the shops at least two weeks; that it had been undergoing what he called general repairs; that the engine in question was one of the large freight engines.

O. C. PAUFF, a witness called on behalf of Petitioner, testified that he was a clerk to the General Foreman at the shops of the Salt Lake Railroad at Los Angeles; that he was so employed at the time of this injury; that the engine in question upon which respondent was employed was No. 3673; that it came into the shops on the 19th day of December, 1918.

"Q. Can you state from your records the nature of the repairs?"

A. Class 3-C.

Q. What do you mean by Class 3-C?

A. Class 3 would be the engine for general overhauling and flues and the C would indicate superheater, application of superheater. That is Government classification.

* * * * *

Q. Will you read the entires in respect to 3673, for each week it was in the shop?

A. There is one for December 28th, showing engine 3673 going into the shop; 12-19 estimated out, 1-30.

The Referee: You mean January 30th?

A. Yes, January 30th—January 4th, 3673, date taken in shop, 12-19; date estimated out, January 30th, Class 3-C.

Mr. Smith: Class 3-C, Remarks—

A. Waiting for material.

Q. That was delay in superheating?

A. Yes—On January 11th, 3673 taken in shop 12-19; date estimated out 1-30, Class of repairs 3-C.

Q. Anything under remarks?

A. No remarks.

Q. W-ere the entries under date taken in and estimated out are the same, just give us the remarks.

A. On January 18th, engine 3673, date taken in 12-19; it is the

14 same as the other report. On January 25th, 3673, 12-19 date taken in, and the date estimated out is 2-15.

Q. What have you under remarks?

A. Delayed on account of material. January 1, 3673, date taken in shop 12-19; date estimated out 2-15; Class 3 repairs; delayed for material; February 8th shows the same information, waiting for material. On February 15th it shows engine taken in shop 12-19; date estimated out 2-22, Class 3-C repairs. Remarks, waiting for material. February 22nd, turned out of shop, Engine 3673, as taken in shop 12-19; date turned out of shop 2-21, Class 3-C repairs.

The Referee: Are these reports that you have been reading from, daily reports of engines in the shops?

A. Weekly.

Q. It is labeled "Daily Reports," but as a matter of fact you make one each week?

A. Yes, one each Saturday.

Q. Do you — whether this engine had a regular run or not?

A. It was assigned to the desert.

Mr. Bennett: What do you mean by that?

A. Out on the desert at Las Vegas, Nevada.

The Referee: Where would the run carry it?

A. It would take it from Yermo, California, to Caliente, Nevada."

Mr. PAUFF further testified that immediately after this engine was taken from the shops, it was given the usual trial trips in the yards, and then on February 25th, it was attached to the San Pedro Local Freight Train. In this connection he further stated that it was customary to test freight engines on some local run after undergoing repairs before they were returned to their regular runs. He then stated in answer to a question as to where engine 3673 went after being tried out on the San Pedro Local:

"Q. It went out on the next trip east on March 4th?

A. Yes, sir.

Q. And has not since returned?

A. No, sir.

Q. In regard to this tri-l on the San Pedro local, was that also in the nature of breaking the engine in before it went back on its assigned run?

A. Yes sir.

Q. Do you do that to other engines that are in the shops here in Los Angeles?

A. Yes.

Q. Did you state that prior to the time it was brought into the shop it was assigned to the desert district, running out of Las Vegas, Nevada?

A. Yes sir.

Q. What character of service was it in, freight or passenger?

A. Through Freight Service.

Q. Are all the through freight trains which go out of Las Vegas, Nevada, interstate trains?

A. Yes.

15 Q. Operating through California, Nevada and Utah?

A. Nevada and Utah.

Q. There is a local which operates out of Las Vegas, running from Las Vegas, Nevada, to Yermo, California?

A. No, it runs to Kelso, California.

The Referee: Was this engine used on that local?

A. 3654 was the regularly assigned engine on that run.

Q. This engine may have been used on that local?

A. It might have been at some time.

Q. But the local runs from Las Vegas, Nevada, to Kelso, California?

A. Yes sir.

Q. Do you know in a general way the character of freight which is handled on that local; that is a local freight, isn't it?

A. Yes sir.

Q. It is not a local passenger train?

A. No, no.

Q. Do you know generally the character of freight which is handled on that?

A. They have all those pick ups at Arden; along the line they pick up.

Q. Is it freight going from one state to another?

A. Yes, they pick up that freight and then put it in the regular train going through.

Q. Is it picked up by the local along between Las Vegas and Kelso, and then put in the regular through train?

A. Yes.

Q. That is, generally speaking?

A. Yes.

Q. Do you know whether or not this engine has been returned to that character of service and has ever since March 4th?

A. It was returned from here."

C. N. ESSENDER, testifying on behalf of Petitioner, stated that he was Chief Dispatcher for Petitioner for seven years, and was so employed at the time of the injury; that as such Chief Dispatcher, it was his duty to order and place the movements of engines used by petitioner, keeping, what he called, a train sheet, which was made up under his supervision. Testifying as to the character of the work done by engine 3673, he says:

"Q. Are you familiar with the engine 3673?

A. My record shows the movement of the engine prior to coming to the shop and after its dismissal from the shop.

Q. Did you have direction of the distributing of the trains over the engine run?

A. All the territory extends to Caliente, beyond this point from East San Pedro to Caliente, Nevada.

Q. Caliente is beyond Las Vegas?

A. Yes, one district beyond Las Vegas.

Q. Mr. Essender, will you state what character of service this

engine 3673, was assigned prior to the time it came into the shops at Los Angeles along about the 19th day of December, 1918?

A. The record shows that it was in through freight service between Las Vegas, Nevada, and Yermo, California.

Q. Can you state whether or not we operate any other character of trains between Las Vegas, Nevada, and Yermo, California, in the freight service?

A. We operate a local between Las Vegas, Nevada, and Kelso, California.

Q. What character of freight does that local handle between Las Vegas and Kelso?

16 A. It handles not only through freight for tonnage, but it handles freight from other local points between Las Vegas and Kelso for Kelso west.

Q. For Kelso and west?

A. Yes.

Q. So that all of the freight handled by that local would be interstate in character?

A. Oh yes.

The Referee: Is this Yermo on the main line or on the branch line?

A. Las Vegas is west of all terminals——

Q. They are both on the main line?

A. They are both terminals on the main line and Kelso is between these two points; the district is too long, so we send it to Kelso and turn it back from there every other day.

Mr. Smith: Do you know how long that engine has been assigned to that through freight service?

A. I couldn't say how long it has been in the service; I just brought the records back from October, and the sheet shows from October that it was in that service.

Q. I was asking you generally?

A. I couldn't say just exactly; it has been there for quite a time in that service.

The Referee: Was this one of the heavy freight engines?

A. One of our main line engines, yes.

Mr. Smith: After it was repaired in the shops at Los Angeles, was it returned to that same service?

A. After it was broke in sufficiently to put it in through service, it was returned to Las Vegas.

The Referee: You have heard the testimony of the witness that just preceded you to the records of the Company; do you substantiate what he said about breaking in?

A. Yes sir.

Q. And the return to the same character of service after the breaking in?

A. Yes, these sheets will show when it left.

Mr. Smith: Your record shows that it left for the east on March 4th, at 8 P. M.?

A. Yes, sir.

Q. And that it never has returned?

A. No, sir.

Q. And that it has been in through service on the main line ever since?

A. Yes sir."

J. P. THOMAS, a witness on behalf of Petitioner, testified that he was Freight Agent at Los Angeles, and has the record showing that *consists* of the San Pedro local to which engine 3673 had been attached on its trial trip, and that this record shows that the local contained at least six carloads of eastern freight for the San Pedro Branch, and returning contained at least three carloads of freight consigned to points in Nevada and Chicago, and that Train Extra East on March 4th, 1919, (the train which was hauled out by engine 3673) when it left for its desert run, contained five carloads of freight consigned to eastern points, and less than carload shipments consigned to points in Idaho, Utah and Nevada.

W. A. KEITH, a witness on behalf of Petitioner, testified that he was General Foreman of the Mechanical Department of the Railroad; was familiar with engine 3673, and knew it was in the shop during part of December, 1918, January and part of February, 1919, undergoing general repairs.

"The Referee: Were these repairs necessary in order to keep the engine in running condition?

A. It is necessary to put the engine in first class condition.

Q. Would it have been able to go on if these repairs had not been made, or was its rundown condition such as would interfere with its running?

A. It wouldn't be profitable to keep the engine in service; it would cost too much to keep it in repair.

Mr. Smith: It would have been possible to continue operating the engine for some time before it was generally overhauled, Mr. Keith, but running repairs would have had to be made constantly?

A. Constantly, yes sir.

Q. As a matter of economy, it was better to have it overhauled and put in first class condition?

A. Yes sir."

Referring to the character of the work to which this engine was assigned, Mr. Keith testified:

"Q. Mr. Keith, you have heard the testimony of Mr. Essender and Mr. Pauff as to the character of service to which this engine has been assigned; is the testimony correct?

A. Yes, it was.

The Referee: Do you know that this is the engine upon which the applicant was injured?

A. Yes, sir.

* * * * *

Mr. Smith: Mr. Keith, you state that this engine had been regularly assigned to the main line freight service in interstate commerce.

prior to the time it was brought in to the shops for this overhauling.

A. Yes sir.

Q. And after it left the shops and was broken in by being run light and run out on this local to San Pedro, it was returned to the same class of service?

A. Yes sir, it was.

Q. And has continued in that service ever since it left here on March 4th, 1919?

A. Yes.

The Referee: Do you know whether it did any switching or not around Los Angeles yards before it was returned to the same service it had been in before?

18 A. No, sir, it wasn't used for switching.

Q. When it was placed in the shop for repairs, what was the intention with respect to the use of the engine after it had been overhauled?

The Referee: Do you have anything to do with the ordering of this engine into the shop for repair?

A. Not that number.

Q. Did you have anything to do with the ordering of it out of the shop?

A. Yes, sir.

Q. What?

A. When repairs were made, completed, I ordered it out of the shop.

Q. Did you have anything to do with designating what service it would go into when it left your hands?

A. Nothing more than from Mr. Merry, the Master Mechanic. I believe he wired me to send engine 3673 to Las Vegas for service.

Q. Did you see that telegram?

A. I believe I did; I didn't look it up, but I believe I have the telegram.

Q. You mean he wired to you?

A. Yes sir. If he didn't do that, I sent the engine where it came from; I would do that, but I think he wired.

Q. The engine was sent to Las Vegas under your orders, was it?

A. Yes.

Q. Did you have yourself any intention as to what was to be done with that engine after it left the shop excepting as your intention might have been governed by orders from your superiors?

A. I knew the engine was going back in the freight service.

Q. How did you know that?

A. Because it always had been in through freight service and I don't think we had anything but that class of engines.

Q. That was the conclusion that you drew from what you knew of its past history and the character of the engine?

A. Yes.

Mr. Smith: Would you have done that class of repairs on an engine if it had not been destined for that class of service in which it had been before?

A. The engine was due for that class of repairs; it was necessary to do that class of repairs.

The Referee: You did the work you were ordered to do on the engine?

A. I would say I had authority to send the engine to Las Vegas out of the shop.

Q. Whom did you get the authority from?

A. I had the authority.

A. You had that authority by virtue of your position with the company?

A. Yes sir.

Q. When you got the engine into the shop for repair, did you have any intention as to what you would do with it after you got the repairs made?

A. Yes sir.

Q. What intention did you have?

A. The intention was to send it back to Las Vegas for freight service.

Mr. Smith: Is there any freight service out of Las Vegas which is not interstate in character? I mean by that, in which the freight would pass from one state into another state?

19 A. I am not well enough posted to answer that; the train sheets would show that.

The Referee: Did you have any instructions when the engine came into the shop for repairs as to what was to be done with it when the repairs were made?

A. Nothing more than the general understanding that it would be returned to the place from which it came.

Q. What do you mean by general understanding?

A. The same as we have on all that class of cars, that is, through freight cars and they overhaul them and return them to through freight service.

Q. Did you receive any instructions from anybody as to what was to be done with that engine when the repairs were made?

A. No; I thought probably that I got a message from Mr. Merry. I am not sure whether I did or not; sometime they are short of power out there and say 'Return engine 3673 to Las Vegas,' but unless I got some instruction of that kind, I would have authority to send the engine back from where it came.

Q. If you had not received any instructions in this case, you would have sent it without any further back to Las Vegas?

A. Yes, sir; to make that a little clearer, if it had been an engine that belonged to some other district, we would notify the dispatcher that the engine was ready to go, and he would give us an order to run the engine out, probably double-head; that would be in order to give him a chance to give the train a little more tonnage with the

double header, arrange for the crew, and take the engine on to its destination."

XV.

Your Petitioner respectfully submits that the Industrial Accident Commission acted without, or in excess of, its powers in making the award to the Respondent Burton in view of the evidence produced at the trial, in that:

1. That the Commission acted without or in excess of its powers. It appears from the evidence which we have quoted at some length above, that engine No. 3673, upon which the Respondent, Mr. Burton was working, had been brought in from an interstate run on which it had been engaged for some considerable time; was put in the repair shop, and immediately upon the completion of the repairs, including the usual trial trip, again returned to the interstate run, and at the time of the trial herein was still so engaged.
2. The evidence does not justify the findings of fact.
3. The findings of fact do not justify the award, order or decision.

In this connection, as we have stated above, the material findings were that the engine upon which the applicant had been working had theretofore been used in interstate commerce, but that during the period from the middle of December, 1918, to the 21st day of February, 1919, said engine had been withdrawn from all service for repairs, and was not an instrument of or engaged in any commerce, and the employe was not engaged in interstate commerce, and both employer and employe were subject to the provisions of the Compensation Act.

We believe that if the court will read over the quoted portions of the evidence hereinbefore set forth, it will agree with us that that finding is in no way supported by the evidence, and particularly that part of the paragraph in which it is stated that the engine was withdrawn from any and all service, and was not an instrument of or engaged in any commerce. We believe that the cases hereafter cited are convincing to the effect that this engine was but temporarily set to one side; that its interstate business was temporarily interrupted for the purpose of making the necessary repairs which would enable it, and which did enable it, to return to an interstate run from which it had been brought. The evidence clearly brings forth the fact that the engine was intended to return to this interstate run, was destined for such a line of work, and was returned to that work immediately upon the completion of the repairs.

We have quoted at some length the evidence given before the Commission, in view of the fact that the sole issue is one which relates primarily to the facts and occurrences which must be brought out by questions and answers, and which are more clearly brought out by actual quotation of such questions and answers rather than by any general statement which we might be able to make as to the

substance thereof. We do not desire to tire the Court by
 21 many citations sustaining our position in the matter, al-
 though there are numerous authorities which we are sure will
 sustain our contention that the applicant in this particular case,
 considering the facts brought out before the Commission, was en-
 gaged in interstate commerce.

One of the early cases was that of

No. Pacific R. R. v. Maerkl, 198 Fed. 1 (1912).

In this case it was stipulated by the parties that the car upon which
 the employe, Maerkl, was injured, was a refrigerator car and had
 been used indiscriminately in intrastate and interstate transporta-
 tion, and that at the time of the injury it was being repaired in the
 yards for use in interstate and intrastate commerce as occasion might
 arise. In discussing this case, the court said—

“* * * that a car so used is one of the instruments of inter-
 state commerce does not admit of a doubt.”

After quoting from earlier cases, the Court continues:

“It was equally plain, we think, that those engaged in the repair
 of such a car as much engaged in interstate commerce as the switch-
 man who turns the switch that passes the car from the repair shop
 to the main track to resume its place in the company's system of
 traffic, or of any of the operators who thereafter handle it in such
 traffic.”

It will be noted in this case that, according to the stipulation, the
 car, after being repaired, was to be used in interstate and intrastate
 commerce as occasion might arise. In the case at bar there was no
 such indefinite purpose with respect to engine 3673. The evidence
 shows that it had come direct from an interstate run and had re-
 turned directly to its interstate run. That return was not a matter
 of chance or probability, but it was according to the destined purpose
 and duties of the engine, and according to the intention of the fore-
 man who had charge of the direction and duties of this engine.
 Clearly, if a car which might be used indiscriminately in intrastate

and interstate commerce is held to be an instrumentality of
 22 that commerce, even more clearly must it appear that an
 engine having a fixed and definite interstate run must be held
 to be an instrumentality of interstate commerce under the Federal
 Employers' Liability Act.

In *Law v. Ill. Cent. R. R.*, 208 Fed. 869, the employe was a boiler
 maker helped, who was repairing a freight engine regularly em-
 ployed by the defendant in interstate commerce. In discussing this
 matter, the court said:

“It is the well settled rule that in order to bring a railroad employe
 within the protection of the Employers' Liability Act, it is not neces-
 sary that he be directly engaged in train movement”, citing the *Pe-
 derson* case, 229 U. S. 146.

Continuing, the Court says:

"There can be no doubt that railroad employes are within the purview of the Employers' Liability Act while engaged in the repair of engines, cars, bridges, tracks and switches actually used in interstate commerce," citing *Walsh v. N. Y. N. H. & H. R. R.* 222 U. S. 5.

The court then continues:

"In the instant case the engine was in the shop for what is called 'round-house overhauling'. It had been dismantled at least 21 days before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It actually was so returned the day following the accident. It clearly did not lose its interstate character from the mere fact that it was not at the time actually engaged in interstate commerce, no more than did the dining car in *Johnson v. So. Pac. R. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 Law Ed. 363, while waiting for a train to make the return trip, or than did the car in the *Walsh* case while standing on a track while awaiting replacement of the drawbar. Were the repairs being made in the round-house between two regular daily trips, the engine, while under such repair, would clearly not lose its character as an instrumentality of commerce; and plaintiff, in such case, would have been engaged in interstate commerce. We have not here a case of original construction of an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and with such character. Its preservation as such was not a matter of indifference to defendant so far as its interstate commerce was concerned. See *Pedersen* case, 229 U. S. 151-152, 33 Sup. Ct. 648, 57 Law Ed. 1125. Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the Act? And is it material whether the repairs take place in a roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character? As held in the *Pedersen* case, the work of keeping instrumentalities used in interstate commerce (which would include engines) in proper state of repair while thus used, is 'so clearly related to such commerce as to be in practice and in legal contemplation a part of it.' "

In the *Law* case, the engine had been undergoing general overhauling and had been dismantled 21 days. In the case at bar the engine was undergoing what is known as Class 3-C repairs, which, in the ordinary course of events would have taken from 30 to 35 days. Due, however, to the inability to secure the necessary parts, the engine was in the shops approximately two weeks longer. Can it be said that there is any material difference between the engine in the *Law* case and the one in the case at bar?

In the case of *Roush v. B. & O. R. R.*, 243 Fed. 712, the doctrine of interstate commerce is extended to an employe of an interstate railway who is engaged in operating a pumping station which fur-

nished water indiscriminately to locomotives engaged in interstate and intrastate commerce.

The case of *Atlantic Coast Line v. Woods*, 252 Fed. 428, involved an injury to an employe who was operating a machine used to cut threads on a bolt which had come out of an engine used in interstate commerce. The court cites the case of *N. & W. Ry. v. Earnest*, 229 U. S. 114, which involved an injury to an employe while piloting a locomotive through a railroad yard, and stated:

"However, in this instance, it cannot be said that the employe was directly engaged in interstate commerce; nevertheless he was performing the work which was necessary to the preparation of the engine which had been, and was to be, used in such commerce."

In this case, the court distinguishes the *Winters* case, 242 U. S. 353, by saying:

"The case at bar, as we have stated, is distinguishable from the cases relied upon by counsel for plaintiff, inasmuch as the engine was taken out of interstate commerce for the express purpose that it might be repaired to enable it to continue as such instrument of interstate commerce. In other words, it is easily distinguished from the *Winters* case because the character of the work in which the engine in this instance was employed did not depend 'upon remote possibilities or upon accidental later events.' It appears from the evidence that engine 88 was regularly engaged in hauling interstate passenger trains, operating under a rule of the road by which it reached Florence every three days. It further appeared that on the day plaintiff was injured this engine was taken out of the Columbia-Wilmington train in order that the U-bolt in question might be repaired. It also appears that the engine was placed in the shop and sent out upon the same day on its regular run hauling what is known as the Columbia-Wilmington train."

The case of *Kuchenmeister vs. L. A. & S. L. R. R.*, 172 Pac. 724, decided by the Supreme Court of Utah, arose out of an injury suffered by plaintiff while working on one of defendant's passenger engines which had been used in interstate commerce. In a very lengthy opinion the court held that the plaintiff could not avail himself of the Federal Employers' Liability Act, citing with approval the law case, *supra*.

The Supreme Court of California, in the case of *So. Pac. vs. Ind. Acc. Comm.*, 175 Pac. 463, extended the doctrine to a member of a repair gang, who had been making light repairs upon cars sidetracked in a yard used indiscriminately for intrastate and interstate commerce, although the man was not killed while actually working on such cars, but while crossing the tracks in the repair yard.

A very recent case, that of *Cent. R. R. of N. J. v. Sharkey*, decided Feb. 2nd, 1919, by the United States District Court for the Southern District of New York, reported in 259 Fed. 144, is, we believe, very pertinent to the case at bar. In this case the employe had been repairing interstate cars, and had made a trip to get certain bolts to

continue his repairs. Having secured the bolts, he was returning to repair a specific interstate car when he was struck by an engine. The court stated that the man was engaged in interstate commerce, and in reply to the statement by counsel that the Winters case was decisive of the question, the court stated:

"In *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, 37 L. Ed. 358. Ann. Cases, 1918B, 54, the injury occurred while the plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury, and was so used afterward; but there was nothing to show that it was permanently devoted to such commerce, or assigned to it at the time, and it was held that the case was not within the Federal Employers' Liability Act. And it is said that the Winters case requires us to reverse the instant case. But this is to overlook the fact that there is evidence in this record, received without objection or exception, that this plaintiff at the time of the injury was in the State of New Jersey, and on his way to complete in that state repairs on a car which belonged to the Pennsylvania Railroad and which was 'a rush order for Philadelphia.' It is not necessary to comment further upon this phase of the case. But we may remark that in the Winters case the engine which was used was not repaired at all for three days following the accident, and that the court in its opinion proceeded on the ground that no interstate movement was immediately in contemplation at the time when the repairs were made. And in *Great Northern Ry. Co. v. Otis*, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. Ed. 322, the Supreme Court held that a car coming from another state and whose interstate movement is arrested to permit repairs fitting it to meet its destination, is not by reason of such delay withdrawn from interstate commerce."

The same court in the case of *Erie Railroad Company v. Szary*, 259 Fed. 178, held that an employe, engaged in sanding engines, was employed in interstate commerce, although there was no specific showing whether the engines in question were to be used in interstate or intrastate commerce.

The Supreme Court of the United States in the case of *Minn. & St. L. R. R. v. Winters*, 242 U. S. 353, considered this question in a very brief opinion, which opinion has been used as a basic for statements by counsel for employes, that a mechanic working on an engine is not engaged in interstate commerce. We believe that a careful reading of that opinion will convince this Court that such is not the holding of the Winters case, nor was it the intention of the Supreme Court to law down such a general rule. In the opinion in that case Mr. Justice Holmes states that the case was brought before the court upon an agreed statement of facts embraced in a few words.

This brief statement was as follows:

26 "This engine 'had been used in the hauling of freight trains over defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18th, when it pulled a

freight train into Marshalltown, and it was used again on October 21st, after the accident, to pull a freight train out from the same place. That is all we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events."

It will be noted that there is no evidence that the engine in question was destined to any particular service. There was no evidence that the engine had been temporarily withdrawn from an interstate run to be returned thereto upon completion of repairs. The court emphasizes the fact that there is no evidence that this engine was destined for any particular haul; that it might be confined to intrastate business, or that it might be assigned to an interstate run. In short, Mr. Justice Holmes states that its character as an instrument of commerce depended upon mere remote probabilities.

In the case at bar, engine No. 3673 had come from an interstate run in which it had been engaged for some considerable time. In fact, so far as the evidence shows, this engine had been used continually for hauling an interstate freight train. The testimony clearly shows that it was the intention to return it to this interstate run; that such was the intention of the foreman, whose powers included the right to assign such engine to certain particular runs, and that after the usual trial trip, which was interstate in character, there being interstate freight contained in the cars moved, it was returned to its regular interstate run from which, so far as the evidence shows, it had never been taken, and was only taken for temporary repairs to enable it to continue in that run.

Under the circumstances, we maintain that the Winters case does not govern the case at bar, and that the cases cited supra, handed down by the Federal Courts of this country, irresistably lead on to the conclusion that the respondent, O. J. Burton, was engaged in interstate commerce at the time of his injury.

Wherefore, your Petitioner respectfully prays:

1. That a Writ of Review issue out of this Honorable Court, directed to said Industrial Accident Commission, commanding it to certify fully to this Honorable Court, at a specified time and place, the record and proceedings in said cause, that the same may be inquired into and determined by this Court;

2. That said matter and records be fully heard and considered by this Court, and that it be Ordered, Adjudged and Decreed that said Industrial Accident Commission be restrained from issuing your Petitioner, be annulled, vacated and set aside.

3. That in the meantime said Respondents be required to desist from further proceedings in said matter to be reviewed, and that said Industrial Accident Commission be restrained from issuing any copy, certified or otherwise, of said decision or award hereinbefore filed, or permit the same to be filed by any Clerk of any Superior Court of the State of California in and for any county, or city and county in said State, in view of the fact that a stipulation has been signed and filed by the said Industrial Accident Commission waiving the written undertaking, as provided by Section 67 of sub-division "C" of the Workmen's Compensation Act of the State of California.

4. That your Petitioner recover its costs herein, and for such other and additional relief as to this Honorable Court may seem just in the premises.

Respectfully submitted,
DANA T. SMITH.
E. E. BENNETT.

29 *Points and Authorities in Support of Petition for a Writ of Review.*

Your Petitioner respectfully submits the following Points and Authorities in support of its Petition for a Writ of Review, with the statement that the greater number of these authorities have been review somewhat at length in its argument in its Petition for a Writ of Review, and that therefore, your Petitioner believes a mere citation of said authorities will suffice for the time being.

I.

The question of whether or not an employe was engaged in interstate commerce is a jurisdictional one under Section 69, Sub-division "C" of the Workmen's Compensation Act, and therefore subject to review by the Supreme Court.

II.

An employe repairing a locomotive or cars, temporarily withdrawn from an interstate run for the purpose of such repairs, and immediately thereafter returned to said interstate run, is engaged in interstate commerce.

Northern Pacific R. R. v. Maerkl, 198 Fed. 1 (1912).

Law v. Ill. Cent. R. R., 208 Fed. 869.

Atlantic Coast Line v. Woods, 252 Fed. 428.

Kuchenmeister v. L. A. & S. L. R. R., 172 Pac. 724.

So. Pac. v. Ind. Acc. Comm., 175 Pac. 463.

Central R. R. of N. J. v. Sharkey, 259 Fed. 144.

Minneapolis & St. L. R. R. Co. v. Winters, 242 U. S. 353.

Respectfully submitted,

DANA T. SMITH,
E. E. BENNETT,
Attorneys for Petitioner.

30 STATE OF CALIFORNIA,
 County of Los Angeles, ss:

W. H. Comstock, being by me first duly sworn, deposes and says That he is the Asst. Fed. Mgr. of the Petitioner in the above entitled action; that he has heard read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me this 20 day of Feb., 1920.
[SEAL.]

EDWARD E. BENNETT,
*Notary Public in and for the County of
Los Angeles, State of California.*

31 *Affidavit of Service by Mail.*

In the Superior Court of the County of —.

No. —.

WALKER D. HINES, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION; O. J. BURTON, Defendant.

STATE OF CALIFORNIA,
 County of Los Angeles, ss:

Francis J. Meiding being duly sworn, deposes and says: That he is a citizen of the United States, over the age of eighteen years and not a party to this action; that he is a clerk of Dana T. Smith who is one of the attorneys for the petitioner in this action; that this affiant and said Dana T. Smith reside and have their office in the City of Los Angeles, County of Los Angeles, State of California; that O. J. Burton is one of the respondents in this action, and that he resides in the City of Hollywood, 6058 Hollywood Blvd., County of Los Angeles, State of California; that in each of said two places there is a United States Post Office, and between said two places there is a regular daily communication by mail.

That on the 20th day of February, 1920, affiant served a true copy of Petition for Writ of Review (to the original of which this is attached), on said O. J. Burton, one of the respondents, by depositing said copy on said date in the Post Office at Los Angeles, California, properly enclosed in an envelope addressed to said O. J. Burton at his said place of resident and business above named, the postage thereon being prepaid.

FRANCIS J. MIEDING.

Subscribed and sworn to before me this 20th day of February, 1920.

[SEAL.]

EDWARD E. BENNETT.

33 In the District Court of Appeal of the State of California,
Second Appellate District.

Civ., No. —.

WALKER D. HINES, Director General of Railroads, United States
Railroad Administration, Operating Los Angeles & Salt Lake
Railroad, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION and O. J. BURTON, Respondents.

Memorandum on Petition for Writ of Review.

The petition for writ of review in the above entitled case sets up only one issue for the consideration of the court, namely—Was the applicant before the Industrial Accident Commission, and one of the respondents here, O. J. Burton, engaged in interstate commerce at the time of his injury?

Briefly the facts are as follows: The applicant was injured in Los Angeles, California, while engaged by the petitioner as a machinist in repairing a freight engine which had been brought from an interstate run between Las Vegas, Nevada, and Kelso, California, for repairs. It was brought to Los Angeles for a general overhauling in December of 1918 and repairs were not completed until the 24th day of February, 1919. A period of practically two months elapsed during which the engine was, for all purposes, withdrawn from commerce of any and every kind. Such being the facts, under the authority of *Baltimore & Ohio Railway Co. v. Branson*, 242, U. S. 623, and of *Minnesota & St. Louis Railway Co. v. Nash*, 242 U. S. 619, this engine was not engaged in interstate commerce, and the injured employee, while engaged in the repair thereof, was not participating in an act of interstate commerce. Therefore, the Industrial Accident Commission has authority in the premises.

It is respectfully submitted that the petition for writ of review should be denied.

A. E. GRAUPNER,
Counsel.

Dated February 24, 1920, at San Francisco, California.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

Margaret McGuire, being first duly sworn, deposes and says: That Dana T. Smith and E. E. Bennett have offices in the City of Los Angeles, California, and are attorneys for the petitioner in the foregoing matter; that A. E. Graupner, attorney for the Industrial Accident Commission of the State of California, has his office in the City of San Francisco, California, that there is daily communication by United States mail between said places, to wit, San Francisco, California, and Los Angeles, California; that affiant, on the 24th day of February, A. D. 1920, placed in the post office at San Francisco, California, securely sealed in an envelope, postage prepaid, a true and correct copy of the attached "Respondents' Memorandum on Petition for Writ of Review," such envelope being addressed as follows:

Messe-s. Dana T. Smith and E. E. Bennett,
Suite 504 Pacific Electric Bldg.,
Los Angeles, California.

MARGARET MCGUIRE.

Subscribed and sworn to before me this 24th day of February, 1920.

[SEAL.]

H. L. WHITE.

*Secretary of the Industrial Accident Commission
of the State of California.*

35 District Court of Appeal, Second Appellate District, State of California, Division Two.

Civil, No. 3296.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, Operating Los Angeles & Salt Lake Railroad, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSIONER and O. J. BURTON,
Respondents.

By the COURT:

It is hereby ordered that a writ of review issue as prayed for in the within petition, returnable before this court at its court-room in Los Angeles, on Tuesday, April 6, 1920, at 10 A. M.

It is further ordered that in addition to the service required by law a copy of the within petition and of this order be served on O. J. Burton, a party beneficially interested, at least 15 days before said Tuesday, April 6, 1920.

FRANK G. FINLAYSON,
Presiding Justice.

Dated, March 10, 1920.

Filed Mar. 10, 1920.

W. D. SHEARER,
Clerk,

By H. C. LILLIE,
Deputy.

36 In the District Court of Appeal, Second Appellate District,
State of California.

WALKER D. HINES, Director General of Railroads, United States
Railroad Administration, Operating Los Angeles & Salt Lake Rail-
road, Petitioner,

against

INDUSTRIAL ACCIDENT COMMISSION and O. J. BURTON, Respondents.

Certiorari.

The People of the State of California to Industrial Accident Commission of the State of California and O. J. Burton, Greeting:

Whereas, It has been made manifest to our District Court of Appeal by the affidavit of W. H. Comstock, on behalf of Walker D. Hines, the party beneficially interested, that in a certain action pending before you, against Walker D. Hines, Director General of Railroads, United States Railroad Administration, operating Los Angeles & Salt Lake Railroad, at the suit of O. J. Burton and Industrial Accident Commission of the State of California, you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy, and adequate remedy, and being therefore willing to be certified of the said action or proceedings,

We therefore command you, That you certify and send to our District Court of Appeal of the State of California, at Los Angeles, on Tuesday, April 6th, 1920, at 10 A. M., at the courtroom of said District Court of Appeal, annexed to the writ a transcript of the record and proceeding in the action aforesaid, with all things touching the same as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our said District Court of Appeal, and that our said District Court of Appeal may further cause to be done thereupon what it may appear of right ought to be done.

Witness, the Hon. Frank G. Finlayson, Presiding Justice of our District Court of Appeal, at the Court Room, in the City of Los Angeles, this 11th day of March, A. D. 1920.

WM. D. SHEARER,
Clerk.

H. C. LILLIE,
Deputy Clerk.

37½ Before the Industrial Accident Commission of the State of California.

Claim No. L. A. 762.

O. J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railway Company, a Corporation, Defendants.

Return of Industrial Accident Commission to Writ of Certiorari.

38 Before the Industrial Accident Commission of the State of California.

Claim L. A. No. 762.

L. J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railway Company, a Corporation, Defendants.

I, H. L. White, secretary of the Industrial Accident Commission of the State of California, hereby certify that the attached is a full, true and correct copy of record of proceedings in the above entitled cause.

Attest my hand and the seal of the Industrial Accident Commission of the State of California.

H. L. WHITE,
Secretary.

[SEAL.]

Dated at San Francisco, California, this 29th day of March, 1920.

39 Before the Industrial Accident Commission of the State of California.

Claim L. A. No. 762.

O. J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railway Company, a Corporation, Defendants.

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Form No. 34.

Industrial Accident Commission of the State of California,

525 Market Street, San Francisco.

Industrial Accident Commission of the State of California.

NOTE—Under the provisions of the Workmen's Compensation, Insurance and Safety Acts, the applicant need only state the general nature of the claim in controversy. Full particulars should be given, but an application will not be held invalid by reason of any defect. This form is intended to assist the applicant and to suggest all necessary particulars. Either party may be represented in person, by attorney or other agent. When application has been filled out and signed by the applicant, the original, together with one copy for each party to the controversy, should be filed with or mailed to the Industrial Accident Commission of the State of California, 525 Market Street, San Francisco.

This application must be filled out in every possible detail.

See chapter 176, Laws of 1913, chapters 541, 607 and 662, Laws of 1915, and chapter 586, Laws of 1917, and chapter 471, Laws of 1919.

Claim No. L. A. No. 762.

O. J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General Railroads, United States Railroad Administration, and Los Angeles and Salt Lake Railway Company, a Corporation, Defendants.

Application for Adjustment of Claim.

Industrial Accident Commission, State of California. Filed July 3, 1919, at — min. past — o'clock — m. F. W. Fellows, by G. W. E. J.

The petition of the above-named applicant respectfully shows to your Honorable Commission as follows:

I.

That on the 1st day of February 1919, O. J. Burton was injured by
Name of person injured. Killed or injured.

reason of an injury arising out of and in the course of his employment by the above-named Walker D. Hines, et al.
Name of employer.

That your petitioner is the (If applicant is a defendant, state relationship) person injured.

II.

That a question has arisen with respect to the compensation to be paid therefor and the general nature of the claim in controversy is as follows, to wit:

Give the date that employer refused to pay the compensation demanded, and state briefly the exact matter in dispute, as for example

(A) Employer denies liability for compensation upon the grounds that: or

(B) A dispute has arisen concerning the amount or duration of the compensation payable.

That a dispute has arisen concerning jurisdiction and defendants allege that applicant's injury arose out of and in the course of employment incidental to inter-state commerce. Defendant's contention is incorrect in that the engine upon which applicant was working at the time of the said injury was withdrawn from service for

repairs for a period of approximately 30 days and was so withdrawn at the time of the said injury.

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III.

That the following is a statement of particulars relative to this application:

1. Name of injured employee. O. J. Burton.
Address. 1535 Hudson Ave., Los Angeles.
Occupation. Machinist.
Age. 44 years.
2. Name of employer. Los Angeles and Salt Lake Railway Company.
Address. Pacific Electric Bldg., Los Angeles.
Place of business. United States Railroad Administration, c/o Legal Dept., L. A. & Salt Lake Ry. Co.
Business address. Pacific Electric Bldg., Los Angeles.
3. Names and addresses of all other defendants and reasons why they are joined. Walker D. Hines, as Director General of Railroads.
Name and address of employer's insurance carrier, if known. None to applicant's knowledge.
4. Place of injury. Employer's Los Angeles Shops.
5. Nature of work on which injured person was engaged at time of injury. Drilling and tapping boiler of engine.
6. How did injury occur? (Describe in detail.) While doing as aforesaid a piece of steel lodged in applicant's left eye.
7. Nature of physical injury. (Describe in detail.) Trauma to left eye.
8. Has injured person fully recovered? See paragraph 9.
If so, when? ____.
When did injured person return to work? ____.
9. Particulars of disability, whether total or partial, and estimated duration thereof. If death resulted, so state, giving date of death. Disability has been total since date of injury and will probably terminate in permanent partial loss of vision.
10. Was medical and surgical treatment required? Yes.
Was it furnished by employer? Yes.
If not, did employer have opportunity to furnish it? Yes.
11. Names and addresses of attending physicians. Dr. J. McKenzie Brown, Brockman Bldg. L. A. Examination by Dr. Stephens, P. E. Bldg. L. A. Dr. Cunningham, Security Bldg., L. A.
12. Wages of employee at time of injury. (State whether paid by day, week, month, or year.) 68¢ per hour, 8 hours *dollars* per *per* day.

How long did injured person work for this employer at this wage prior to the injury? About 2 months.

State whether employment was for 5, 5½, 6, 6½, or 7 days per week. 6 days per week.

13. Amount injured person is now earning or is now able to earn in some suitable employment or business (after the injury). \$— per week; \$— per month.

42 14. Payment, allowance or benefit received from employer. For medical care and attendance, unknown to applicant. \$282, paying compensation for approximately 14.4 weeks.

15. Additional amount claimed as compensation. To be determined. \$19.50 per week for period to be determined.

16. When and how was the employer notified of the injury? Employer had immediate knowledge and was notified Feb. 7, 1919.

17. If employer was not notified within thirty days after date of injury, give reason for failure to notify him. —.

18. If application is filed to adjust claim for death, state name, address and relationship of all dependents. If to adjust claim for medical attendance or funeral expenses, state name and address of all other such creditors and amount of claims, if known. Name, —; Age, —. Address, —. Name, —; Age, —. Address, —. Name, —; Age, —. Address, —. Name, —; Age, —. Address, —.

IV.

(Here state any further facts that may be desired)

Wherefore your petitioner prays, that the above-named defendant be required to answer this petition, that a time and place be fixed for hearing hereof and due notice thereof given, and that upon such hearing, an order or award be made by your Honorable Commission granting such relief as the said applicant may be entitled to in the premises.

(Signed)

O. J. BURTON,

Address, 1535 Hudson Ave., Los Angeles, Calif.

Dated at Los Angeles, California, this 3rd day of July, 1919.

C.J.E.: M.E.N.

[Endorsed:] Industrial Accident Commission of the State of California. Application.

43 Industrial Accident Commission of the State of California.

Claim No. L. A. No. 762.

O. J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railway Company, a Corporation, Defendants.

Notice of Hearing of Application for Adjustment of Claim.

Industrial Accident Commission, State of California. Filed July 7, 1919, at — Min. Past — o'clock — m. H. L. White, by G. W.

The People of the State of California Send Greeting to O. J. Burton, Applicant; Walker D. Hines and Los Angeles & Salt Lake Railway Company, Defendants:

You are hereby notified that the application of O. J. Burton, entitled as above, to adjust a claim for compensation arising out of injuries sustained by him (a copy of which is attached hereto) has been filed in the office of the Industrial Accident Commission of the State of California, 307 Underwood Building, 525 Market Street, San Francisco, California. You are further notified that said application has been set for hearing at 405 Union League Building, Los Angeles, California, on the 22nd day of July, 1919, at 2 o'clock p. m., and that at said time and place the Industrial Accident Commission of the State of California will proceed to hear and dispose of the said application in the manner provided by law.

Witness:

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA.

By F. W. FELLOWS,
Secretary.

Dated at San Francisco, California, this 7th day of July, 1919.

Rule I.

(2) Answer.—The Answer, if any, of the defendant must be filed within five days after the service of the Application upon any such defendant, and shall set forth the facts upon which he intends to rely by way of defense. A copy of such Answer must be served forthwith by such defendant upon all adverse parties. The Answer must contain denials or admissions of every material statement in the Application.

Rule II.

Service of Pleadings and Notices and Proof Thereof.—Any pleading, notice or document may be served either by delivering to and leaving with the person to be served a copy thereof or by mailing to such person a copy thereof in a sealed envelope, with the postage thereon fully prepaid, addressed to such person at his last known place of business or residence. Personal service, if made, must be made by a person over the age of eighteen years.

Proof of service may be made by the affidavit or oral testimony of the party making such service.

In addition to the above, service and proof of service may be made in any manner provided by the Code of Civil Procedure of this State.

NOTE.—Either party shall have the right to be present at any hearing, in person or by attorney or by any other agent, and to present such testimony as may be pertinent. (Workmen's Compensation, Insurance and Safety Act, Section 24, Chapter 176, Laws of 1913.)

[Endorsed:] No. —. Industrial Accident Commission of the State of California. Notice of Hearing of Application for Adjustment of Claim.

STATE OF CALIFORNIA,

City and County of San Francisco:

Esther Johnson being duly sworn, deposes and says: That -he is an employee of the Industrial Accident Commission of the State of California, that -he served the foregoing notice on the applicant and defendant, hereinafter mentioned, at the time set opposite their respective names, by depositing a copy of said notice, attached to a copy of the application therein mentioned, in a sealed envelope in the United States mail on said day, at San Francisco, California, with the postage thereon fully prepaid, and addressed to the said applicant and defendant-, at their last known places of business or residence, as follows, to wit:

Names of parties served.	Date of service
O. J. Burton, 1535 Hudson Ave., Los Angeles, Cal. . .	July 7, 1919.
Walker D. Hines, Dir. Gen. R. Ss. c/o Salt Lake Ry. Co., Pac. Elec. Bldg., Los Angeles, Cal.	“
L. A. & Salt Lake Ry. Co., Pac. Elec. Bldg., Los Angeles, Cal. Legal Dept.	“
F. B. Lord, San Francisco, Cal.	“

ESTHER JOHNSON,
Signature.

Subscribed and sworn to before me this 8 day of July, 1919.
F. W. FELLOWS,
Secretary.

44 Before the Industrial Accident Commission of the State of California.

Claim No. L. A. 762.

J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railroad Company, a Corporation, Defendants.

Answer.

Industrial Accident Commission State of California. Filed July 11, 1919, at 3 min. past 4 o'clock p. m. F. W. Fellows, By G. W., E. J.

Come now the defendants hereinabove named, and answering the Application on file herein admit, deny and allege as follows:

I.

Said defendant Walker D. Hines, Director General, admits the allegations contained in paragraph one of said application; said defendant Los Angeles & Salt — Railroad Company denies that said applicant was injured by reason of an injury arising out of and in the course of his employment by the said defendant Railroad Company, but alleges that the use, operation, possession and control of said defendant Railroad was taken over by the United States Railroad Administration under and by virtue of an Act of Congress and the proclamation of the President of the United States, effective December 31st, 1917, and that said use, operation, possession and control existed at the time of the alleged injury.

II.

45 Admit that a dispute has arisen concerning the jurisdiction of this Commission, but deny that the contention of the defendants herein that said employe was engaged in Interstate Commerce is incorrect.

III.

Admit the allegations contained in sub-divisions one, two, three, four, ten and fourteen of paragraph three of said application.

Said defendants have no knowledge, information or belief as to the allegations contained in sub-division five, six, seven, nine, twelve, thirteen and sixteen of paragraph three, and, basing its answer on said want of knowledge, information and belief, deny each

and every of the allegations contained in said sub-divisions of paragraph three.

Second Defense.

For a second and separate defense to said application said defendants allege:

That the line of the defendant Railroad Company, now in the possession, use, operation and control of the defendant Walker D. Hines, runs in and between the States of Utah, Nevada and California, and said defendant Walker D. Hines is engaged as a common carrier of freight and passengers in Interstate Commerce; that said applicant at the time of the alleged injury was engaged in Interstate Commerce, towit: in repairing a locomotive used by said defendant, Walker D. Hines, in interstate commerce; that this Honorable Commission, therefore, has no jurisdiction in this matter.

Third Defense.

And for a third and separate defense said defendants allege that whatever injury occurred to said applicant was caused solely and entirely by the serious and wilful misconduct of said applicant in that he wilfully and intentionally neglected to provide himself with proper safeguards furnished by said defendants and required by the rules of said Railroad for the safety of its employee while engaged in the line of work in which said applicant was engaged at the time of his alleged injury.

Wherefore, your defendants pray that said application be dismissed, and for such further relief as to this commission may seem just.

DANA T. SMITH,
E. E. BENNETT,
Attorneys for Defendants.

47 Before the Industrial Accident Commission of the State of California.

L. A. No. 762.

O. J. BURTON, Applicant,

v.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, and Los Angeles & Sale Lake Railroad Company, a Corporation, Defendants.

Affidavit of Service.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

E. E. Bennett, having been first duly sworn deposes and says that he is a citizen of the United States of America over the age of twenty

one years, and not a party to or interested in the above entitled proceeding; that at the request of Dana T. Smith, one of the attorneys for the defendants in said action, he served the within answer upon the Applicant named therein by delivering a true copy thereof to said applicant J. O. Burton personally, at his address, No. 1535 Hudson Avenue, in the City of Los Angeles, County of Los Angeles, State of California, on the 10th day of July, 1919.

E. E. BENNETT.

Subscribed and sworn to before me this 11th day of July, 1919.

[SEAL.]

FRANCIS J. MIEDING,

Notary Public.

48 STATE OF CALIFORNIA,
County of Los Angeles, ss:

C. C. Barry, being by me first duly sworn, deposes and says: that he is the auditor of one — the defendants *Walker D. Hines* in the above entitled action; that he has heard read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are stated upon his information or belief, and as to those matters that he believes it to be true.

C. C. BARRY.

Subscribed and sworn to before me this 10 day of July 1919.

EDWARD E. BENNETT,

*Notary Public in and for the County of
Los Angeles, State of California.*

49 Before the Industrial Accident Commission of the State of
California.

Claim No. L. A. No. 762.

O. J. BURTON, Applicant,

vs.

WALKER D. HINES et al., Defendants.

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Industrial Accident Commission State of California. Filed July 30, 1919, at — min. past — o'clock — M. F. W. Fellows, by G. J. Sept. 6, 1919. G. W.

Witnesses

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50 Before the Industrial Accident Commission of the State of California.

Claim L. A. #762.

O. J. BURTON, Applicant,

VS.

WALKER D. HINES, Director General Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railway Company, a Corporation, Defendants.

Report of Hearing.

This cause came on regularly for hearing before the Industrial Accident Commission of the State of California on July 22nd 1919, at two o'clock P. M., Room 405 Union League Building, Los Angeles, California, before F. W. Fellows, Referee.

The applicant was present in person.

The defendants were represented by Dana T. Smith and E. E. Bennett, Attorneys-at-law, with offices at 504 Pacific Electric Building, Los Angeles, California.

An answer was made herein.

Blanch Sameth, Reporter.

51 It was stipulated as follows:

1. That the injury complained of occurred after the Director General of Railroads of the United States Railroad Administration had taken over the control of the lines of the Los Angeles and Salt Lake Railroad Company, a corporation, and that the said Los Angeles and Salt Lake Railroad Company, a corporation, was not the employer at the time of the injury claimed and that the said defendant may be dismissed herefrom.

2. That on the 1st day of February, 1919, at Los Angeles, California, O. J. Burton, hereinafter referred to as the employee, applicant herein, was in the employ of Walker D. Hines, as Director General of Railroads of the United States Railroad Administration, hereinafter referred to as the employer, one of the defendants herein.

3. That at said time the employee was not insured against liability for compensation under the Workmen's Compensation, Insurance and Safety Act of 1917, but that a certificate of consent to self insure had been issued to the defendant, Los Angeles and Salt Lake Railroad Company, a corporation, by the Industrial Accident Commission of the State of California, the benefit of which accrued to the defendant, Walker D. Hines, as Director General, as aforesaid.

4. That on said 1st day of February, 1919, at Los Angeles, California, the employee was injured in the following manner: That while drilling and tapping the boiler of an engine a piece of steel lodged in his left eye; that said injury arose out of and in the course of said employment; was proximately caused thereby, and occurred while the employee was performing services growing out of and incidental to the same.

5. That the medical, surgical and hospital treatment required in the past in the attempt to cure and relieve the employee from the effects of said injury, was provided by the employee, except the dental services of Dr. Frank G. Staley.

6. That at the time of said injury, the age of the employee was forty-four years, and his occupation that of machinist.

7. That the actual daily earnings of the employee at the time of said injury were \$5.44 for employment six days per week; the average weekly earnings, as defined by said Act, are agreed to be \$31.01, and that said sums may be used as a basis for determining the compensation to be paid, if any.

8. That the employer does not claim to have been prejudiced by reason of any lack of notice of claim of injury.

9. That compensation amounting to the sum of \$282 has been paid by the employer.

The issues are:

1. Whether at the time of said injury, the employer and employee were subject to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, and to the jurisdiction of this Commission.

2. Whether at the time of said injury, the employee was engaged in Interstate Commerce.

3. Whether the said injury was proximately caused by the wilful misconduct of the employee.

4. Whether the employer is liable for the services of Dr. Frank Staley.

5. Nature, extent and duration of disability.

BURTON

v.

WALKER D. HINES, etc., et al.

Transcript of Testimony.

Dr. C. R. K. SWETNAM, address 1002 Brockman Building, a witness called on behalf of applicant, being first duly sworn, testified as follows:

By the Referee:

Q. What is your name?

A. C. R. K. Swetnam.

Q. Your address?

A. 1002 Brockman Building.

Q. Are you a physician and surgeon?

A. Yes.

Q. Graduate from what medical school?

A. Georgetown University, 1904.

Q. When were you licensed to practice in California?

A. 1914.

Q. Have you practiced continuously ever since?

A. Yes.

Q. Do you specialize?

A. Yes.

Q. In what?

A. Eye, ear, nose and throat.

Q. Did you make an examination of the applicant in this case any time on or after the 1st day of February, 1919?

A. Yes.

Q. When?

A. February 3rd.

Q. At whose request was that examination made?

A. At the request of the Salt Lake Railway Company.

Q. What complaint was made at that time by the applicant?

A. Of something in his eye and pain.

54 Q. Did he give you any history?

A. Yes, he gave a history: While at work a piece of steel I think it was, he thought it was, flew into his eye.

Q. What diagnosis did you make?

A. Diagnosis of foreign body on the cornea.

Q. How did you determine that?

A. By examination and seeing it.

Q. Did you remove that foreign body?

A. Yes.

Q. What was that?

A. As near as I can make out, a little piece of steel, a particle so fine, impossible to say whether it was rust or steel, hard enough to cut the cornea.

Q. Did you draw it out with a magnet?

A. I lifted it out with a sharp instrument.

Q. Did you have any further connection with the case?

A. Yes, I saw him frequently after that.

Q. How frequently?

A. Every day for quite a while.

Q. What was the last date upon which you saw him?

A. I guess the last date I saw him was the 8th of April.

Q. Just where had this foreign body entered the eye?

A. It was within the cornea and just to one side of the pupil.

Q. Had it gone through the cornea?

A. No; it had gone through several layers of the cornea.

Q. What progress was made in the case during the time you had him under treatment?

A. The case did not progress at all well; in fact, at the end of about three weeks, it was getting worse instead of better.

Q. How do you account for that?

55 A. The only way we could account for it was that the injury was added to or stimulated by some constitutional condition.

Q. Just what condition developed that makes you say it was getting worse?

A. The eye developed what we call a keratitis, a thickening and opacity of the cornea, and there was continuous iritis, or inflammation of the iris.

Q. What constitutional disorder might cause that?

A. It might be some focus of infection or it might be some of the deeper one, such as syphilis or tuberculosis.

Q. Do you know whether such focus of infection was found?

A. We thought we found it in the roots of the teeth and tonsils and those were removed.

Q. Both teeth and tonsils were removed?

A. Yes.

Q. Who asked the employee to have that done, do you know?

A. Well, we did; we advised it in our office because we thought it was the best thing for progress of the case.

Q. Do you know how many teeth were removed?

A. No I don't.

Q. Do you know whether any teeth were substituted?

A. I don't know.

Q. After the removal of the teeth, did the condition of the eye improve?

A. It seemed to for just a very few days and then got worse again.

Q. Was a Wassermann ever taken?

A. Yes.

Q. What result?

A. Negative; that was on the 21st of February.

Q. Was an examination for tuberculosis made?

56 A. Yes; I don't remember the date of the chest examination.

Q. What did that show?

A. On the 5th of June, there was a skin test for tuberculosis made, which was very positive.

Q. Do you consider that reliable?

A. Yes, your Honor.

Q. Who made the test?

A. The laboratory of Brem & Zeiler.

Q. Have you had much experience with this skin test for tuberculosis?

A. Quite a little.

Q. Did you find it in your experience to be reliable?

A. As reliable as any test when no physical findings can be had.

Q. Was any other examination made for tuberculosis, that you know of?

A. I don't know, your Honor, whether he was examined as to the chest or not.

Q. What was the condition of the eye on the 8th of April?

A. It was not so well.

Q. You mean that the cornea was becoming more and more opaque?

A. Yes.

Q. That was the only abnormal condition?

A. There was inflammation also and the iritis.

Q. How bad was that?

A. It was quite bad. It is pretty hard to give a quantitative statement as to that; it was so bad that the patient couldn't face light at all; couldn't use the eye.

Q. Could you tell by a superficial examination today what the condition of the eye is in those respects?

A. The eye is better.

57 Q. Do you find any iritis present?

A. I wouldn't like to say that without putting him under

light.

Q. It is impossible to tell by a superficial examination, is that true?

A. Whether there was absolutely any iritis there or not. He is very much more comfortable though, because he couldn't wear his glasses like that before.

Q. You are not in a position to say, having seen him so long ago, whether or not in your opinion there will be permanent disability?

A. No; but Dr. Brown has seen him and he can answer that question.

Q. Did he give you a history of any previous trouble with the eye?

A. No sir.

Q. At the time you first saw him did you consider that the eye condition was such as to disable him from doing his work?

A. Yes sir.

Q. Totally?

A. Yes.

Q. Did that condition of total disability exist during all the time you had him under your care?

A. Yes.

Q. Are you a part of the medical staff of the employer?

A. Yes.

By Mr. Smith:

Q. Would riding in an automobile without wearing his dark glasses be conducive to more rapid recovery of his injury than to the contrary?

A. That depends on the time.

Q. In the day time?

A. And the stage of the condition.

Q. Would it be all right for him to drive an automobile now without wearing dark glasses?

A. I think that question better be asked Dr. Brown; he has seen him more recently. The time I saw him last, it would be very bad for him to drive an automobile.

Q. With a superficial examination today, would you have any opinion with respect to that matter?

A. Dr. Brown has been seeing him the last few weeks; he is here.

Q. Which eye was injured?

A. It was the left eye.

The Referee:

Q. How large is the piece that you took out?

A. About, probably as large as the very tip of that lead pencil would be if chipped off.

Q. The lead itself?

A. The lead itself; it is very small; I don't know how to measure it.

Mr. Smith: What condition did you find with regard to his tonsils and teeth? You say you found foci?

A. There was pus in the tonsils which could be expressed and the X-ray showed trouble with the roots of the teeth.

Q. Did those conditions, in your opinion, tend to aggravate the injury which he had received?

A. Yes; we thought at that time that they were probably the whole cause, but that proved not to be so.

Q. Was the injury to the cornea one which an ordinary normal person not suffering constitutionally from any infection or disease, have yielded to treatment readily, or the contrary?

A. Well, we would expect it to yield fairly readily; of course, it would have laid him out a few days.

Q. What in your opinion in ordinary circumstances would have been the extent of his disability with an injury of that character?

A. I would say that probably five or six days.

(Witness excused.)

Dr. JOHN M. BROWN, address 1002 Brockman Building, Los Angeles, California, a witness called on behalf of applicant, being first duly sworn, testified as follows:

By the Referee:

Q. What is your name?

A. John M. Brown.

Q. Your address?

A. 1002 Brockman Building.

Q. You are a physician and surgeon?

A. Yes sir.

Q. Graduate from what medical school?

A. Western University, Kansas.

Q. What year?

A. 1899.

Q. When were you licensed to practice in California?

A. 1909.

Q. Have you practiced continuously since that time?

A. Yes.

Q. Do you specialize?

A. Eye, ear, nose and throat.

Q. Did you examine the applicant in this case at any time on or after the 1st day of February, 1919?

A. I did.

Q. When?

A. The 1st day of April is the first time I saw him.

Q. At whose request?

A. At the request of the Railroad Administration.

Q. Was that examination made in your office?

60 A. In my office.

Q. What complaint did the applicant make at that time?

A. Of a pain and disturbance in his left eye.

Q. You were given the history that has already been mentioned here?

A. Yes.

Q. What diagnosis did you make?

A. Up until the present time.

Q. Did you give him any treatment?

A. I did.

Q. Over how long a period?

A. Up until the present time.

Q. In your opinion were the ulcer of the cornea and the iritis caused by this foreign body?

A. Primarily.

Q. What progress did you note during the time you had him under your care?

A. Up to about the 5th day of June, it made very little progress. When he had his tonsils removed, it progressed for two or three or four days; similarly later with his teeth. Then he went back to the same condition as formerly. In June, since about the 5th of June, it has progressed steadily and rapidly.

Q. What is the last date upon which you saw him?

A. Friday last.

Q. That would be July 19th?

A. July 19th.

Q. Tell his condition at that time.

A. He had an opacity of about one quarter of an inch in diameter on the cornea.

Q. Was the iritis present then?

61 A. No sir; none that I could discover.

Q. Will this opacity clear up or is it a permanent condition?

A. It will probably clear up; there may be some, I can't tell, but probably will clear up.

Q. Have you an idea of how long it will take?

A. Probably about three months.

Q. At the time that you first saw him was the condition of the eye such as to prevent him from doing his work?

A. Absolutely.

Q. Has that condition of total disability existed ever since in your opinion?

A. Yes, it still exists.

Q. In your opinion it still exists?

A. Yes.

Q. Have you made any test of the eye with regard to power of vision?

A. Yes.

Q. When?

A. Friday; he has two-fifths vision in that eye.

Q. Did you test the other eye?

A. Not then.

Q. Have you ever tested it?

A. Yes, probably a month or two ago.

Q. What vision did it have?

A. 20/20.

Q. Did you find any other condition in the injured eye which would interfere with vision beside the opacity of the cornea?

A. No.

Q. In your opinion if the opacity of the cornea were removed, would he have normal vision?

62 A. Yes.

By Mr. Smith:

Q. You say that you examined the other eye and found it to be normal, a month or two ago?

A. Yes, normal.

Q. And you examined the injured eye on Friday?

A. Yes.

Q. Incidentally did you in that examination observe the condition of the other eye?

A. No, I did not examine the other eye.

Q. Could you by casual examination at the present time, give us an opinion as to the condition of the other eye?

A. If I had a chart here that I could test his vision.

Q. You would want to do it in that way?

A. Yes.

Q. So far as you observed, is there any condition of the right eye which would interfere with the vision of that eye?

A. No.

Q. What is the present interference with the vision of his eye? is that sufficient to prevent him, totally incapacitate him from work? I mean his left eye?

A. Yes, at the present time.

Q. It would incapacitate him?

A. Yes.

Q. You state, in your opinion that would incapacitate him for a period of about three months?

A. I would think so.

Q. In treatment of this eye, have you advised the applicant to wear dark glasses to keep the light from the eye?

A. Yes.

Q. Would the fact that he had driven an automobile without wearing dark glasses at all during the day time be liable to affect the rapidity with which his eye might recover in any way?

A. Probably not; probably inconvenience him more than it would hurt the eye.

The Referee: All the services that you performed were at the instance and request of the employer?

A. Yes sir.

(Witness excused.)

O. J. BURTON, address 1535 Hudson Avenue, Los Angeles, California, applicant herein, being first duly sworn, testified as follows:

By the Referee:

Q. What was the general nature of the work that you were doing for the Salt Lake Railroad?

A. Just about everything that comes under machinist's work.

Q. Where were you working?

A. At the time of this accident?

Q. Generally.

A. Generally what you call the back shop.

Q. In the Los Angeles yards?

A. The Los Angeles shops.

Q. Where were you working at the time this injury occurred? In what place?

A. I was working in the back shop.

Q. What were you working on?

A. On the boiler of an engine; I don't know the number of it, 3673, I think it was. Whatever the number of the engine is, I don't know; the number is nearly always lost in the back shop.

Q. What kind of engine was it?

64 A. It was one of the large class freight engines.

Q. Do you know whether it had a regular run or not?

A. No sir.

Q. Do you know what run it had been on just before it went into the shop?

A. I do not.

Q. Do you know what run it went out on after it left the shop? If it has left the shop.

A. No sir.

Q. How long had it been in the shop, if you know, at the time you were working on it?

A. I couldn't say for certain on account of not working on it continually from the time it got in. We worked on other engines, but I should judge from the condition that the engine was in that it had been in the shop at least two weeks, little more, according to the amount of work.

Q. What condition was it in that makes you think that?

A. The machine was all stripped from the engine, the bottom was stripped.

Q. What do you mean by being stripped?

A. Everything—all the pipes, jacket, and practically everything that could be removed from the boiler had been taken off except the frames.

Q. Were the wheels taken off?

A. The wheels were taken off and at that time I think part of the fire box was out.

Q. Do you know the nature of the repairs that were being made at that time?

A. It is what they call general repairs.

Q. Just exactly what were you doing when you were hurt?

65 A. I was fitting a reinforcement to an air pump bracket to the boiler and it was necessary to drill and tap some holes for studs to hold these brackets on.

Q. Had you ever been instructed to wear goggles when you were doing that work?

A. Not at that particular work.

Q. Had you ever received any instructions with regard to the use of goggles?

A. We had instructions to use goggles when performing dangerous work, such as grinding or chipping, or anything that the chips or particles are liable to fly.

Q. Were you wearing goggles at this time?

A. I was not.

Q. Do the other workers wear goggles while doing work similar to the kind you were doing at this time?

A. Not as a rule; there is nothing in that piece of work that anything is liable to fly; whether or not actually doing dangerous work themselves, they do not wear goggles unless some one near them is doing something liable to cause them trouble.

Q. Who asked you to have your teeth removed?

A. Dr. Brown.

Q. To whom did you go for that work to be done?

A. Dr. Staley.

Q. Do you know how many teeth he removed?

A. Four.

Q. What did he charge you?

A. He hasn't finished the work.

Q. Has he been treating your gums since he removed the teeth?

A. Yes, he treated the gums.

Q. Have artificial teeth been put in place of those that were removed?

66 A. He is working on them now.

Q. You are having them put in at the present time?

A. Yes.

The Referee: It is stipulated that if an award be made herein in favor of the employee for the reasonable value of the dental services performed by Dr. Staley, the said reasonable value may be determined by the filing of an itemized bill of the aforesaid services with the Industrial Accident Commission and by the approval of said bill or the determination of a reasonable charge for the services indicated on said bill by the Medical Director of the Industrial Accident Commission; said Award, if made, may be made payable directly to the said Dr. Staley.

By the Referee:

Q. Have you paid Dr. Staley anything on account?

A. I have not.

Q. You have been to no expense for medical treatment except for services of this one doctor?

A. That is all.

Q. Was any foreman present at the time that you got this piece of steel in your eye?

A. A foreman?

Q. Yes.

A. No sir; only in a general way; he was in the shop I presume.

Q. Do you know whether he knew about your getting the steel in your eye at that time?

A. Not right at that time; I didn't go right to him and tell him about it; later on I told him that I would have to get an order on the doctor and have it taken out.

Q. When did you tell him that?

A. That was on the 3rd.

67 Q. The 3rd of February?

A. Yes.

Q. Where was he at the time?

A. I don't know; simply some place in the shop.

Q. Was anybody else present when you had conversation with him?

A. Not that I remember.

Q. Did you make any complaint to any one at the time that you received the injury?

A. I had one of the machinists there in the shop look in my eye to see if he could see anything.

Q. He was on the same footing with you there; he was not over you in any way?

A. No.

Q. When did you claim that first notice was given to the employer of the injury that you had received?

A. On the 3rd when I got the order on the doctor.

Q. That was at the time you just spoke of when you spoke to the foreman?

A. Yes.

Q. He gave you the order?

A. The general foreman's clerk.

Q. What was his name?

A. Bauff.

Q. What doctor did he send you to?

A. Dr. Stephens.

Q. Dr. Stephens was one of the company's doctors, was he?

A. Yes.

Q. And a specialist?

A. No; he is the surgeon, but not an eye specialist.

Q. Have you done any work since you were injured?

68 A. No sir.

Q. Why not?

A. On orders from the doctor, from both doctors, Dr. Swetnam and Dr. Brown.

Q. Their orders were what?

A. Not to do anything that would require any use of the eye or expose it to extreme light or anything that would irritate it in any way.

Q. Did you have your tonsils removed?

A. Yes.

Q. Who did that work for you?

A. Dr. Brown removed the tonsils.

Q. You were put to no expense for that yourself?

A. None.

By Mr. Smith:

Q. Who was the foreman that you say you reported this to on the 3rd?

A. Mr. Pickles.

Q. You did not report it to Mr. Keith?

A. No sir.

Q. Then you went to Mr. Pauff and got orders from him to go to the doctor?

A. Yes.

Q. Did you have any conversation with Mr. Pauff at the time you got this order in regard to your eye?

A. Only to tell him I wanted an order on the doctor; I had something in my eye.

Q. You told him you had something in your eye?

A. Yes.

Q. You did not say when you had gotten it or anything about that to Mr. Pauff?

69 A. I don't know whether I did or not.

Q. This was the 3rd when you told the foreman, Pickles, and got this order?

A. Yes.

Q. And you claim that you got this particle in your eye on the 1st?

A. Yes sir.

Q. It did not start to hurt you immediately I take it or you would have reported it sooner and gone to the doctor sooner?

A. It bothered me some. I had frequently had particles get in my eye and washed it out.

Q. Then you washed it?

A. Probably for two or three days; may be for a day it would be sore a little bit; something like that.

Q. You have had that happen many times?

A. Everybody has; most of those men working now has had particles in their eye several times.

Q. You remember when you got this in your eye, do you?

A. Yes.

Q. You remember the incident?

A. Yes.

Q. It wasn't just like these numerous other incidents when you got small particles of stuff in your eye?

A. I remember it; I knew at the time, sure.

Q. And you know that it is a requirement of the company when you suffer an injury that you make a personal injury report, do you not?

A. Yes sir.

Q. And you did not think it was of sufficient consequence at the time you received the injury to make the report?

70 A. At the time I received the injury I wasn't back to the round house—yes, I was too.

Q. Then you say you got injured on the 1st; you were there on the 2nd and on the 3rd; you got an order to go to the doctor,—say, you didn't think it of sufficient importance at the time you received the particle in your eye to warrant your making out a personal injury report?

A. No, it didn't seem anything serious.

Q. When it developed and was more serious, you made out a personal injury report?

A. Yes.

Q. That you did on the 25th day of March, did you not?

A. I don't know just the exact day it was.

Q. Will you examine the signature attached to that and tell me if that is not your signature?

(Handing report to witness.)

A. Yes.

Q. That was the date you signed it, March 25, 1919?

A. Yes.

Q. In this personal injury report you say that the engine number was 3673?

A. Yes.

Q. That was correct was it not, just for the purpose of fixing the identity—

The Referee: At the time that you signed this paper, did you yourself, without anybody telling you, know the number of the engine?

A. No.

Q. Did you at that time have it called to your attention that the number of the engine was in there?

A. All I had at that time was the shop order of the engine.

71 Q. Do you know whether or not the number of the engine, as contained in this report, is correct?

A. No, I have to depend on the company's record for that.

Q. Did you know at the time you signed the record that that number contained in the report was correct?

A. The clerk, I believe, told me that was the number of the engine from my shop order number.

By Mr. Smith:

Q. Did you examine your shop order to see whether that was correct or not?

A. I had the shop order when he made out the report.

Q. And you checked that?

A. And I told the clerk that that was the shop order number; that I wasn't sure, wasn't positive as to the engine number, and I took his word or their word for it and they put in the engine number to correspond to the shop number.

Q. You did not check it up yourself to verify the correctness of the engine number?

A. No.

Q. As far as you know that is correct?

A. Yes.

Q. At any rate it was—

A. I am not questioning but that they put the proper engine number in there.

Q. At any rate it was one of the large freight engines?

A. Yes, I think it was a freight engine; I couldn't say—

Q. It might be used—

A. They might be using it in passenger service.

Q. You know different types of engines and you designated this on direct examination as a large freight engine?

A. Yes.

72 Q. State what work you were doing, fitting some reinforcement brackets?

A. For an air pump.

Q. And in order to do that it was necessary for you to drill and tap some holes for the stud?

A. Yes sir.

Q. That was what you were doing at the time this particle flew into your eye?

A. Yes.

Q. Will you state exactly how you drill and tap those holes for the stud, just exactly what the work consists of in drilling and tapping those holes for the stud; do you use a hammer?

A. No; I used an air holder and drill set-up, what they call an "old man" in order to give you backing; of course, you drill through.

Q. You drill through?

A. The shell of the boiler.

Q. It is steel, is it?

A. Yes.

Q. That is what you were doing? You were using an air holder and drill?

A. I had finished drilling holes and was tapping them out.

Q. In tapping them out, what did you use, a hammer?

A. No, I don't use a hammer; a wrench and what they call taps for that purpose; that goes on the inside of the hole and cuts threads on the inside of the hole.

Q. The holes were complete then, the metal taken out?

A. Yes.

Q. And you were then reaming them?

73 A. That is not the same as reaming, but I believe the thread goes through.

Q. That cuts the middle and leaves the thread?

A. Leaves the thread in there so you can screw the set in.

Q. That is the work you were doing?

A. Yes.

Q. Do any burrs form on those holes when you drill them that have to be chipped off or when you are making threads?

A. No sir; no occasion for using a hammer and chisel on that part of the work.

Q. Do you know where the particle of metal came from that went into your eye?

A. It came from an air holder on the platform where some men were working on one side of me.

Q. What work were they doing?

A. They were putting—setting their motor and platform for tapping and putting in staples.

Q. Were they doing the tapping at the time this particle came into your eye?

A. They were getting ready to.

Q. How did it happen that this particle came from their work into your eye?

A. It didn't really come off of their work; it came in the exhaust from the air motor as they started it. They were on the platform just level, their motor was just about level with my head and they were on a platform and they just hung their motor up on a rope.

it was heavy; it came up on ropes to hold them up; they connected up their air and started the motor.

Q. What did that do?

A. Well, as the motor turned over the exhaust goes right through it and out one side, and that exhaust struck me in the side

74 of the face.

Q. That exhaust is air, I take it?

A. Yes.

Q. Is this compressed air in the motor?

A. Yes.

Q. That exhaust doesn't come in contact with any steel dust?

A. No; there is liable to be dirt in it.

Q. Steel filings?

A. Steel, or anything; there is no telling what will come through there.

Q. How near were these men to you?

A. Probably about three or four feet, working right opposite me, on the same platform.

Q. The character of work that they were doing was such as would require the wearing of goggles, was it not?

A. No sir, not necessarily; it would come under what you would say dangerous work.

Q. Wouldn't it come under the terms, chipping and grinding of metal?

A. No sir.

Q. The work that you were doing would come under that?

A. No sir: I was cutting those threads.

Q. You distinguish between grinding and cutting of metal? You distinguish, they are different things, are they?

A. Yes sir; grinding will cut, but cutting is not necessarily grinding.

Q. This is your personal record card, is it, Mr. Burton?

(Handing witness card.)

A. Yes sir.

75 Q. And in answer to the question, "Have you received, read, and do you understand shop safety rules, "you answered, "Yes." Is that correct?

A. Yes sir.

Q. Is that the copy of Safety Rules for the shop which you received at the time you signed this card?

A. I didn't receive any; all I have was what was posted up there.

Q. You are familiar with that form, are you not, of rules?

A. Yes sir.

Q. You have seen that?

A. Yes, it is up there.

Q. This is in your handwriting, in answer to that question, on your personal record card?

A. Yes sir.

Q. And you just stated that was a correct answer to the question, "Have you received, read, and do you understand shop safety rules?"

A. Yes.

Q. At any rate you are familiar with the rules of Safety as stated in the Shop Safety Rules?

A. Yes.

The Referee: It is stipulated that the report of personal injury to employees, dated March 25, 1919, signed O. J. Burton, may be received in evidence as Defendants' Exhibit 1.

By the Referee:

Q. I notice on this statement, under No. 26, Remarks, Note, "Was not advised of accident until this date," with a purported signature of W. A. Keith. Who was he?

A. He was the general foreman.

76 Q. Do you know whether that statement that I have just read was on this report at the time you signed your name to it?

A. It wasn't when I signed it.

Q. You are sure of that?

A. Yes sir.

Q. Did you read the entire report over before you signed it?

A. I withdraw that statement as to that; that may have been on there, but Mr. Keith's name was not on there.

Q. I don't quite understand from your answer, do you mean that it may have been and it may have been, or do you mean that statement was on there when you signed it?

A. I will change that; it may have been when I signed it.

Q. You do not know?

A. No.

Q. You are sure W. A. Keith was not on there when you signed your name?

A. Quite sure.

The Referee: It is stipulated that Safety Rules for Shopmen may be received in evidence as Defendant's Exhibit 2.

(Witness excused.)

O. C. PAUFF, address 417 West 55th Street, Los Angeles, California, a witness called on behalf of applicant, being first duly sworn testified as follows:

By the Referee:

Q. What is your name?

A. O. C. Pauff.

Q. What is your address?

A. 417 West 55th.

Q. Los Angeles, California?

77 A. Yes.

Q. Are you employed by either of the defendants in the case?

A. The Los Angeles and Salt Lake Railroad.

Q. In what capacity?

A. Clerk to the general foreman.

Q. Were you so employed during the month of February, 1919?

A. Yes sir.

Q. Did the applicant report to you an injury to his eye at any time during the month of February?

A. Why, I think it was the 3rd of February, he came in for an order on the doctor.

Q. What did he say to you at that time?

A. At that time I asked him what was the matter with him; he said he had sore eyes and also that he had throat trouble.

Q. Did he tell you anything about the injury to his eye?

A. No sir.

Q. You gave him an order to go to the doctor, did you?

A. Yes sir.

Q. What doctor did you refer him to?

A. Just Dr. Cocran; we always issue an order on Dr. Cocran; he is the chief surgeon.

The Referee: Mr. Burton, do you contend that you told him at that time that you had injured your eye?

Mr. Burton: Yes sir.

The Referee:

Q. You are quite sure he said nothing about receiving anything in the eye in the way of a piece of foreign matter.

A. Yes sir.

Q. What did you refer him to Dr. Cocran for?

A. We issue all orders, any of the employees that asks for an order, we issue them in the office.

Q. If a man has any constitutional disorder or any sickness, do you send him to the doctor?

A. Certainly, there are restrictions, of course.

Q. What restrictions?

A. Certain diseases, of course, we do not. Any individual, if they ask for an order on the doctor, I always ask what the trouble is.

Q. Did I understand you to say that you give the order on the doctor no matter what complaint is made and let the doctor decide whether it is something the company should treat them for?

A. Yes.

Mr. Burton: What gave you the impression that I said I had a sore throat?

A. I don't know; that is what you told me; you said something of your tonsils at that time and I remember very distinctly in issuing the order on the doctor, I always write in the book what the trouble is. I handle all accident reports.

(Handing paper to referee.)

The Referee: Did you make a written entry in your book in regard to this case?

A. Yes; each case I do.

Q. Is this the memorandum that you made?

A. Yes.

Q. When did you make that?

A. The date I issued the order.

Q. This memorandum reads, "2-3-19 O. J. Burton, sore eyes. There is nothing there about trouble with the throat or tonsils.

A. No; you can notice through the books I do that, I handle all accidents, each accident make a report to the doctor.

79 Q. You made no memorandum of his complaining of throat trouble; you simply remember that?

A. Yes sir.

Q. You are positive he said that at the time?

A. Yes; I have a stenographer in the office, he recalled the incident.

Mr. Smith:

Q. There is another entry there?

A. "3-6-eye treatment.

The Referee: Did he come to you at that time in person?

A. Yes sir.

Q. What conversation did he have with you then?

A. At that time?

Q. Yes.

A. He didn't say anything about being injured; from the fact of his being in the office the first time, I didn't pay so much attention to him.

Mr. Smith: Will you hand him that personal injury report, your Honor—Mr. Pauff, did you make out that personal injury report that Mr. Burton signed?

A. Yes.

Q. I will ask you to state whether or not under the heading "Note" on the back, that statement was there at the time it was signed by Mr. Burton, the typewritten statement?

A. The typewritten statement was, yes.

Q. Who signed "W. A. Keith?"

A. I.

Q. Do you remember when you signed it in relation to the time that Mr. Burton signed it?

A. Right directly after that, at the time Mr. Burton—this was made out, I believe that Mr. Hussee told him to come down to the office to make out an accident report, that he had a report of the accident.

80 Q. Mr. Pauff, did you verify the number of the engine with the work report?

A. No, I didn't; at the time of the accident?

Q. Yes.

A. I have a shop order list; I keep a list of engines showing engine number and the shop order number, and if a man will

8156—

Q. What would that mean?

A. Engine 3200.

Q. That is the shop order?

A. Yes sir.

Q. And Mr. Burton had a shop order for the work that he was doing on the 1st of February, 1919, did he not?

A. Yes sir.

Q. Did you check that up to ascertain the number of the engine that he was working on at that time?

A. Yes, I recall the shop order numbers; I am familiar with them and recall all.

Q. Was the engine upon which he was working on the 1st day of February, 1919, 3673 as it appears on that personal injury report?

A. Yes.

Q. Did you bring your record of the work done on that engine?

A. No.

Q. I mean when it came into the shop.

A. Yes.

Q. Will you produce that record? You were subpoenaed on behalf of the applicant?

A. Yes.

81 Q. To bring these records?

A. There was nothing said about these records.

Q. When does it say the engine came into the shop?

A. 3673—12-19.

Q. That is December?

A. December, 1919.

Q. That is when—

A. That is the date when it went into the shop.

Q. Can you state from your records the nature of the repairs?

A. Class 3-C.

Q. What do you mean by Class 3-C?

A. Class 3 would be engine for general overhauling and flues, and the C would indicate superheater, application of superheater. That Government classification.

The Referee: I don't understand what you mean by the last remark by the class of work.

A. Superheater, that means superheating engine arrangement for increasing steam pressure.

Q. That is some appliance to be installed?

A. Yes, it is an appliance.

Q. How often are those reports that you have in your hands made out?

A. Weekly.

Q. Will you read the entries in respect to 3673, for each week it was in the shop?

A. There is one for December 28th, showing engine 3673 going to shop; 12-19 estimated out, 1-30.

The Referee: You mean January 30th?

A. Yes, January 30th—January 4th, 3673, date taken in shop,

12-19; date estimated out, January 30th, Class 3-C.

82 Mr. Smith: Class 3-C, Remarks—

A. Waiting for material.

Q. That was delay in superheating?

A. Yes—On January 11th, 3673 taken in shop, 12-19; date estimated out, 1-30, Class of repairs, 3-C.

Q. Anything under remarks?

A. No remarks.

Q. Where the entries under date taken in and estimated out are the same, just give us the remarks.

A. On January 18th, Engine 3673, date taken in, 12-19—It is the same as the other report. On January 25th, 3673, 12-19 date taken in, and the date estimated out is 2-15—

Q. What have you under remarks?

A. Delayed on account of material. January 1, 3673, date taken in shop, 12-19; date estimated out, 2-15; Class 3 repairs; delayed for material; February 8th, shows the same information, waiting for material. On February 15th, it shows engine taken in shop 12-19; date estimated out, 2-22, Class 3-C repairs. Remarks, "Waiting for material." February 22nd, turned out of shop, Engine 3673, as taken in shop 12-19; date turned out of shop, 2-21, Class 3-C repairs.

The Referee: Are these reports that you have been reading from daily reports of engines in the shops?

A. Weekly.

Q. It is labeled "Daily Reports," but as a matter of fact you make one each week?

A. Yes, one each Saturday.

Q. Do you know whether this engine had a regular run or not?

A. It was assigned to the desert.

Mr. Bennett: What do you mean by that?

A. Out on the desert at Las Vegas, Nevada.

83 The Referee:

Q. Where would the run carry it?

A. It would take it from Yermo, California, to Caliente, Nevada.

Q. Worked regularly on that one route alone?

A. Yes; it would work out of Las Vegas.

Q. Did it come from that run in December?

A. Yes.

Q. Do you know what run it went into when it left the shop?

A. The first time it left the shop—We break all engines in.

Q. Where did it run then?

A. In the yards, we break them in to see whether everything was in condition; in the first trip it was used on the San Pedro local.

Q. That was a run that was purely in Southern California?

A. In connection with the beach; it brings freight up from San Pedro. We break trains up here and take them out from Los Angeles and then it came in the shop and was in the shop and then went out on a through freight train and never has been back since.

Q. Do you know how far it went on that through freight?

A. Through to Las Vegas.

Mr. Smith:

Q. After an engine is in the shop for overhauling, such as this one underwent, is it necessary to run it out as a light engine or in the yards for the purpose of breaking it in and seeing that it works all right?

A. When it receives the class of repairs this engine did, yes.

Q. That was the first thing that was done with the engine after it left the shops?

A. Yes, and we do that with all engines that received that class of repairs.

Q. If, in that breaking in, anything develops which makes it necessary for further repairs to be made, it is returned to the shop and further repairs made?

A. Yes sir.

Q. And the first trip in the Revenue service was on the San Pedro local?

A. Yes sir.

Q. That is a freight train, is it?

A. Yes sir.

Q. And the first trip was the San Pedro local leaving Los Angeles on the 25th day of February, 1919, at 11.45?

A. It leaves here each night, yes sir.

Q. 11.45 p. m.?

A. Yes sir.

Q. That was the first trip?

A. That was the first trip it made after it left the shop.

Q. Did it engage in Revenue Service on the return trip from San Pedro?

A. Yes sir.

The Referee: What do you mean by "Revenue Service?"

Mr. Smith: That is where we receive paid freight.

By Mr. Smith:

Q. What do you mean by the Revenue Service?

A. That is when a train would go into paid service, where they would receive payment for the shipment.

Q. Upon its return trip did it come in on the San Pedro Local from San Pedro on the 26th?

A. Yes sir, the next day.

Q. The next day in February?

A. Yes sir.

Q. That was also a freight train from San Pedro to Los Angeles?

A. Yes sir.

Q. Do you know whether or not this engine was used in switching at all?

A. No sir, it was not.

By the Referee: What did they do with it while they had it in the yard following repairs?

A. They went out possibly on the main line, run the engine up and down.

Q. Without any cars attached?

A. Without any cars attached, yes sir.

By Mr. Smith: That is what you mean when it runs light?

A. Yes sir.

Q. Light is when the engine does not haul cars?

A. Yes.

Q. It went out on the next trip east on March 4th?

A. Yes sir.

Q. And has not since returned?

A. No sir.

Q. In regard to this trip on the San Pedro local, was that also in the nature of breaking the engine in before it went back on its assigned run?

A. Yes sir.

Q. Do you do that to other engines that are at the shops here in Los Angeles?

A. Yes.

Q. Did you state that prior to the time it was brought into the shop it was assigned to the desert district, running out of Las Vegas, Nevada?

A. Yes sir.

Q. What character of service was it in, freight or passenger?

A. Through freight service.

Q. Are all the through freight trains which go out of Las Vegas, Nevada, interstate trains?

86 A. Yes.

Q. Operating through California, Nevada and Utah?

A. Nevada and Utah.

Q. There is a local which operates out of Las Vegas, running on Las Vegas, Nevada, to Yermo, California?

A. No, it runs to Kelso, California.

The Referee: Was this engine used on that local?

A. 3654 was the regularly assigned engine on that run.

Q. This engine may have been used on that local?

A. It might have been at some time.

Q. But that local runs from Las Vegas, Nevada, to Kelso, California?

A. Yes sir.

Q. Do you know in a general way the character of freight which is handled on that local; that is a local freight, isn't it?

A. Yes sir.

Q. It is not a local passenger train?

A. No, no.

Q. Do you know generally the character of freight which is handled on that?

A. They have all those pick-ups at Arden; along the line they pick up.

Q. Is it freight going from one state to another?

A. Yes; they pick up that freight and then put it in the regular train going through.

Q. It is picked up by the local along between Las Vegas and Kelso and then put in the regular through trains?

A. Yes.

Q. That is generally speaking?

A. Yes.

87 Q. Do you know whether or not this engine has been returned to that character of service and has been ever since March 4th?

A. It was returned from here.

(Witness excused.)

C. N. ESENDER, Chief Dispatcher of the Los Angeles and Salt Lake Railroad Company at Los Angeles, California, being first duly sworn, testified as follows in behalf of defendants:

By Mr. Smith:

Q. What is your name?

A. C. N. Esender.

Q. What is your business, Mr. Esender?

A. Chief Dispatcher for the Los Angeles & Salt Lake Railroad.

Q. How long have you occupied that position?

A. Seven years.

Q. Were you so employed on the 1st of February, 1919?

A. Yes sir.

Q. Prior thereto and subsequent thereto?

A. Yes sir.

Q. Continuously?

A. Yes.

Q. Mr. Esender, in your capacity as Chief Dispatcher, do you have anything to do with the ordering and placing of movement of engines used by the Los Angeles & Salt Lake Railroad?

A. Yes sir.

Q. In the course of your business, do you keep what is called train sheets, showing the movement of various trains and engines?

A. Of every train and engine.

Q. And is that record partially made up by yourself and by others under your direction?

88 A. That is a record made directly by dispatchers on duty at the time.

Q. Are they under your supervision and direction?

A. Yes.

Q. Do you make some of them yourself?

A. No, I made no records on the train sheet.

Q. How many different dispatchers are employed?

A. Eight.

Q. You have brought with you the train sheets covering what period?

A. I have the months of October, December, I think, and March and April.

Q. Of what year?

A. 1918 and 1919.

Q. Are you familiar with this engine, 3673?

A. My record shows the movement of the engine prior to coming to the shop and after its dismissal from the shop.

Q. Did you have direction of the distributing of trains over the entire run?

A. All the territory extends to Caliente, beyond this point from East San Pedro to Caliente, Nevada.

Q. Caliente is beyond Las Vegas?

A. Yes, one district beyond Las Vegas.

Q. Mr. Esender, will you state what character of service this engine 3673 was assigned to prior to the time it came into the shops at Los Angeles along about the 19th day of December, 1918?

A. The record shows that it was in through freight service between Las Vegas, Nevada and Yermo, California.

Q. Can you state whether or not we operate any other character of trains between Las Vegas, Nevada, and Yermo, California, in the freight service?

A. We operate a local between Las Vegas, Nevada, and Kelso, California.

Q. What character of freight does that local handle between Las Vegas and Kelso?

A. It handles not only through freight for tonnage, but it handles freight from other local points between Las Vegas and Kelso for Kelso and west.

Q. For Kelso and west?

A. Yes.

Q. So that all of the freight handled by that local would be interstate in character?

A. Oh yes.

The Referee: Is this Yermo on the main line or on the branch line?

A. Las Vegas is west of all terminals,——

Q. They are both on the main line?

A. They are both terminals on the main line and Kelso is between these two points; the district is too long, so we send it to Kelso and turn it back from there every other day.

Mr. Smith: Do you know how long that engine had been assigned to that through freight service?

A. I couldn't say how long it had been in the service; I just brought the records back from October and the sheet shows from October that it was in that service.

Q. I was asking you generally.

A. I couldn't say just exactly; it has been there for quite a time in that service.

The Referee: Was this one of the heavy freight engines?

A. One of our main line engines, yes.

Mr. Smith: After it was repaired in the shops at Los Angeles was it returned to that same service?

A. After it was broke in sufficiently to put in through service, it was returned to Las Vegas.

The Referee: You have heard the testimony of the witness that

just preceded you to the records of the company; do you substantiate what he said about breaking in?

A. Yes sir.

Q. And the return to the same character of service after the breaking in?

A. Yes, these sheets will show when it left.

Mr. Smith: Your record shows it left for the east on March 4th, at 8 P. M.?

A. Yes sir.

Q. And that it never has returned?

A. No sir.

Q. And that it has been in through service on the main line ever since?

A. Yes sir.

(Witness excused.)

J. P. THOMAS, Aliso and Meyers Streets, Los Angeles, California, a witness called on behalf of defendants, being first duly sworn, testified as follows:

By Mr. Smith:

Q. What is your name?

A. J. P. Thomas.

Q. You are——

A. Freight Agent of the Salt Lake Railroad.

Q. At Los Angeles?

A. Yes.

Q. Mr. Thomas, have you brought with you the records showing the consists of the San Pedro local which left here 11:45 on February 25th, and the San Pedro local which returned on the 26th, and which departed from here east on March 4th, at 7:30 P. M.?

A. Yes sir.

Q. The San Pedro local leaving Los Angeles 11:45 on February 25, 1919, from your records, can you state whether or not it contained any interstate freight which came on through, billing from eastern points to Wilmington or San Pedro, on the San Pedro Branch?

A. Yes; it contained at least six carloads of eastern freight for the San Pedro branch.

Q. Will you give the cars and the billing from your record?

A. The car numbers—B. & O. car of steel from Philadelphia to, we were to deliver at the P. E. at Wilmington for switching into one of the freight yards; another car of steel for the Southwestern Shipbuilding Company from Gary, Indiana; car of castings, Central Railroad of New Jersey car for the Wilmington switching connection, for the shipyard; from Homestead, Pennsylvania, Pennsylvania car loaded with machinery from the same point for Wilmington for delivery to the P. E. yard; car of steel Union Pacific, for one of the Long Beach shipyards from Chicago; New York

Central car of steel for the Long Beach shipyard from Gary, Indiana.

Q. State generally whether or not those San Pedro local freight trains carry interstate freight of this character?

A. I don't suppose there would be one here that does not have interstate freight on it.

Q. The San Pedro local returning on February 26th, will you give us the consist of some of the cars contained in that train?

A. Here is a D. P. & S. W. car, loaded with ties from East San Pedro to Las Vegas, Nevada; two Pacific Fruit Express refrigerator cars loaded with vegetables from Fruitland and Ball, on the San Pedro branch, to Chicago.

92 Q. Have you also the consist of this train, extra east on March 4th, 1919?

A. 8 P. M., yes, sir; that had on it three carloads of fruit in Pacific Fruit Express cars for Des Moines, Iowa, and Milwaukee, Wisconsin; also tank carload, Salt Lake tank car, of gasoline for Idaho Falls; at less than carload shipments in three merchandise cars for Placerville, Idaho, Devilslide and Castle Gate, Utah; a carload of sand in a Union Pacific car for Las Vegas, Nevada.

Q. Mr. Thomas, is that extra east one of our regular trains?

A. It is not a schedule train; it does not go at a given time every day; it is what we call extra; it is common for us to run at least one of those extras every day most of the year.

Q. Are they through freight trains?

A. Yes.

(Witness excused.)

W. A. KEITH, 407 South Cummings Street, Los Angeles, California, a witness called on behalf of defendant, being first duly sworn testified as follows:

By Mr. Smith:

Q. Mr. Keith, what is your name?

A. W. A. Keith.

Q. Where do you reside?

A. 407 South Cummings, Los Angeles.

Q. What is your position?

A. General foreman of the mechanical department.

Q. Are you familiar with this engine which has been referred to in the testimony as number 3673?

A. Yes, sir.

Q. Do you know whether or not it was in the shop during part of December, January, and part of February, of 1918 and 1919?

93 A. Yes, it was.

Q. What is the character of work that was done?

A. General repairs.

Q. Mr. Keith, you have heard the testimony of Mr. Esender and Mr. Pauff as to the character of service to which this engine had been assigned; is the testimony correct?

A. Yes, it was.

The Referee: Do you know that this is the engine upon which the applicant was injured?

A. Yes, sir.

Q. Was he working under you at the time?

A. Yes, in a way; he was working under a foreman who was under me.

Q. How soon did you know about the injury?

A. I heard about it; I didn't hear about the injury to his eye; it might have been a month or two afterwards.

Q. How do you know that was the engine?

A. The foreman he was working under told me that.

Q. Did you see the engine at any time that it was in the shops at that time?

A. I seen it every day.

Q. Just what repairs were made that you speak of as general repairs; I would like to have you tell me in detail as far as you know, to that engine.

A. The engine was dismantled; all the parts were removed with the exception of the boiler and frame; the fire box was not removed, but the engine received, or the fire box received half size sheet, back and front flue sheets, and was equipped with a superheater.

Q. Was that all that was done?

A. All the repairs that were made; there were renewals, the machinery and boiler.

Q. Just what do you mean by that?

A. To put the engine in first class condition.

Q. Can you tell me in detail just what it was that was done in order to accomplish that?

A. All the worn parts were renewed.

Q. Do you know what parts were worn and renewed?

A. Not without looking over the report. I could state what the renewals were; I have given you the repairs made to the boiler. The tires were renewed or turned; I think they were turned.

Q. What do you mean, "turned" did you say?

A. Yes.

Q. What do you mean by that?

A. Put in a lathe and the original thickness of the tire, when it becomes worn on the *troat* and flanges the part that comes in contact with the rail, it is put in the lathe.

Mr. Smith: Rounded smooth as it was in the beginning?

A. Yes.

The Referee: Were any other repairs made at that time that you remember?

A. The driving box braces were all renewed; driving journals turned.

Mr. Smith:

Q. Whenever you use the word "turned" you mean by that it was smoothed up on the lathe?

A. New bearing put on, a new round surface.

Q. By being ground on the lathe?

A. By being turned on the lathe; the spring rigging was overhauled; some renewals were made to the cylinders; they were re-bored; the pistons were renewed; valve jumper bushings applied; new valve jumper bushings applied, new valves applied; guides were overhauled; the rods, all side rods and the main rod, overhauled, and new bearings applied; all pipe was overhauled;
95 some renewals made in the cab, that is the fixtures in the cab were overhauled and the engine was painted.

The Referee: Were these repairs necessary in order to keep the engine in running condition?

A. It is necessary to put the engine in first-class condition.

Q. Would it have been able to go on if these repairs had not been made or was this run down condition such as would interfere with its running?

A. It wouldn't be profitable to keep the engine in service; it would cost too much to keep it in repair.

Mr. Smith: It would have been possible to continue operating the engine for some time before it was generally overhauled, Mr. Keith, but running repairs would have had to be made constantly.

A. Constantly, yes, sir.

Q. As a matter of economy it was better to have it overhauled and put into first-class condition?

A. Yes, sir.

The Referee: All general shops for the company are located at Los Angeles?

A. We do general repairs at Los Angeles, but the general shops are located at Las Vegas.

Q. Why was the engine brought to Los Angeles instead of Las Vegas?

A. That had more work than they could handle at Las Vegas, Nevada, and we take some engines from them, from that point, in fact all along the line, from Los Angeles to Salt Lake, in our shops.

Mr. Smith: Mr. Keith, you state that this engine had been regularly assigned to the main line freight service in interstate commerce prior to the time it was brought into the shops for this overhauling?

A. Yes, sir.

96 Q. And that after it left the shops and was broken in being run light and run out on this local to San Pedro, was returned to the same class of service?

A. Yes, sir, it was.

Q. And has continued in that service ever since it left here March 4th, 1919?

A. Yes.

The Referee: Do you know whether it did any switching or not around Los Angeles yards before it was returned to the same service it had been in before?

A. No, sir, it was not.

Mr. Smith: It was not to your knowledge?

A. No, sir, it wasn't used for switching.

Q. When it was placed in the shop for repairs, what was the intention with respect to the use of the engine after it had been overhauled?

The Referee: Do you have anything to do with the ordering of this engine into the shop for repair?

A. Not that number.

Q. Did you have anything to do with the ordering of it out of the shop?

A. Yes, sir.

Q. What?

A. When repairs were made, completed, I ordered it out of the shop.

Q. Did you have anything to do with designating what service it would go into when it left your hands?

A. Nothing more than from Mr. Merry, the master mechanic, I believe he wired to send engine 3673 to Las Vegas for service.

Q. Did you see that telegram?

97 A. I believe I did; I didn't look it up but I believe I have the telegram.

Q. You mean he wired to you?

A. Yes sir; if he didn't do that, I sent the engine where it came from; I would do that, but I think he wired.

Q. The engine was sent to Las Vegas under your orders, was it?

A. Yes.

Q. Did you have yourself any intention as to what was to be done with that engine after it left the shop excepting as your intention might have been governed by orders from your superiors?

A. I knew the engine was going back in the freight service.

Q. How did you know that?

A. Because it always had been in through freight service and I don't think we had anything but that class of engines.

Q. That was the conclusion that you drew from what you knew of its past history and the character of the engine?

A. Yes.

Mr. Smith: Would you have done that class of repairs on an engine, if it had not been destined for that class of service in which it had been before?

A. The engine was due for that class of repairs; it was necessary to do that class of repairs.

The Referee: You did the work you were ordered to do on the engine?

A. I would say I had authority to send the engine to Las Vegas out of the shop.

Q. Whom did you get the authority from?

A. I had the authority.

Q. You had that authority by virtue of your position with the company?

A. Yes sir.

98 Q. When you got the engine into the shop for repair, did you have any intention as to what you would do with it after you got the repairs made?

A. Yes sir.

Q. What intention did you have?

A. The intention was to send it back to Las Vegas for freight service.

Mr. Smith: Is there any freight service out of Las Vegas which is not interstate in character? I mean by that, in which the freight would pass from one state into another state?

A. I am not well enough posted to answer that; the train sheets would show that.

The Referee: Did you have any instructions when the engine came into the shop for repairs as to what was to be done with it when the repairs were made?

A. Nothing more than the general understanding that it would be returned to the place from which it came.

Q. What do you mean by general understanding?

A. The same as we have on all of that class of cars; that is, through freight cars and they overhaul them and return them to through freight service.

Q. Did you receive any instructions from anybody as to what was to be done with that engine when the repairs were made?

A. No; I thought probably that I got a message from Mr. Merry. I am not sure whether I did or not; sometimes they are short of power out there and say, "Return Engine 3673 to Las Vegas" but unless I got some instructions of that kind, I would have authority to send the engine back from where it came.

Q. If you had not received any instructions in this case you would have sent it without anything further back to Las Vegas?

99 A. Yes sir; to make that a little clearer, if that had been an engine that belonged to some other district, we would notify the dispatcher that the engine was ready to go and he would give us an order to run the engine out, probably double-head; that would be in order to give him a chance to give the train a little more tonnage with the double header, arrange for the crew, and take the engine on to its destination.

(Witness excused.)

Whereupon the matter was submitted for decision by the Commission

BLANCHE SAMETH,
Reporter.

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Stip., Page 14.

Los Angeles, Cal., July 31st, 1919.

Industrial Accident Commission, 405 Union League Bldg., in Account with Dr. Frank G. Staley, Dentist, 615 Auditorium Bldg.

To Professional Services, Mr. O. J. Burton.

4 Teeth Extracted and after treatment of socket.
Removable artificial denture..... \$55.00

Received payment.

Approved Aug. 2, 1919. \$55.

K. L. D.,

Asst. Med. Director.

101

DEFT. EXHIBIT 1.

Los Angeles & Salt Lake Railroad Company.

Report of Personal Injury to Employees, Passengers, and Other Persons.

Instructions.—A separate blank must be filled out for each person injured, whether the injury is severe or slight, by each employe present. Every question must be answered fully, if blank spaces are insufficient for full statement, answer further in form of letter and attach hereto. Send report to Superintendent, who will forward to Claim Agent.

1. Name, residence (street and number) and P. O. address of person injured. O. J. Burton, 1535 Hudson Ave., Los Angeles, Cal.
2. Age, 44. Occupation, Machinist.
3. A. Married or single? Married. If married, name and residence of wife or husband. As above.
- B. If single, names and addresses of father, mother or nearest relative. X.
4. A. Employee, passenger, traveler on highway, or trespasser? If employee, how long in service of this Company, and in what capacity? Employed as Machinist, in service 3 months.
- B. If passenger, where from and destination? Ticket or pass? X.
- C. If unknown, give full description (height, weight, hair, eyes, marks and clothing) and state what articles found on person. X.
5. A. State fully the nature and extent of injuries. Got something in my eye, eye became infected.
- B. How long off duty on account of this accident? X.
6. A. What was done with and for the person? By whose direction? X.
- B. If not sent to hospital, why not? X.

C. Name and address of surgical attendant? Dr. Brown, Brockman Bldg., Los Angeles, Cal.

D. If dead, state disposition of remains (Attach copy of verdict of Coroner's jury, if inquest held). X.

7. A. Date, hour, (day or night) and exact point where accident occurred? 2:00 P. M., February 3rd, 1919, Los Angeles Roundhouse.

B. If at night, was it very dark? Kind of weather. X.

C. Did accident occur on or near a crossing? (State name and distance and direction from same.) Was watchman on duty? X.

D. Was view of trainmen or injured person obstructed? If so, by what? State fully. X.

E. Distance person was seen before accident? X.

F. Could train possibly have been stopped between time collision was imminent and time of accident? X.

G. On main or side track? Curve or straight line? (State whether curve to right or left). Up or down grade?

8. A. Train No. —. Conductor, Yardmaster or Foreman? X.

B. Engine No., 3673. Engineman, — —. Fireman, —

102 C. Baggage man, — —. Head Brakeman, — —. Rear Brakeman and Porter, — —. X.

D. Switchman. X.

E. No. cars in train. No. loads. No. cars with air brakes. In what direction was train moving? X.

F. Speed of engine or cars at time of accident? If train late how much? If backing up, who was on rear end? X.

9. State your location with reference to point of accident, and whether you were an eye witness. Injured party.

10. What was injured person doing at time accident occurred? Putting pump bracket studs in boiler.

11. Give full particulars of cause of accident. Boilermakers were working on same side of boiler; I turned to look for my helper and boilermakers started air motor and something struck me in right eye.

12. A. Was person injured while making coupling or uncoupling? Who examined coupling apparatus, and was it in good order? X.

B. State kind of draw bars. Were draw-heads of equal height?

13. Give initials and numbers of engines and cars immediately connected with this injury, and condition of same. Engine 3673 in shop for repairs. If in bad order, were they also marked?

14. A. Was there any defect in track, bridges, buildings, rolling stock, machinery, tools, or other appliances, that caused or may have assisted in causing the injury? If so, state fully. No defects.

B. If there was any defect, how long had same existed? Had same been reported? If so, when, by whom, and to whom? No defects.

C. Did injured person know of defect? None.

D. Give your reason for knowing or believing injured person knew of defect prior to accident. None.

15. State what precautions were taken and by whom to prevent accident. None; was not wearing goggles.

16. In your opinion, what further precautions could have been taken? None that I know of.

17. Was the engine properly handled? Was engine equipped with automatic bell ringer? X.

18. A. What signals or warnings were given, and by whom and in what way. None.

B. Were signals or warnings acted upon? If not, why? None.

19. A. Was whistle sounded? Was bell rung, and by whom? Was bell by automatic ringer? X.

103 B. When and where, with reference to the accident was whistle sounded and bell rung? X.

20. What distance did engine, or cars, run after accident occurred? X.

21. What does injured person say as to extent of his injuries? Cannot use eye; temporary.

22. A. What does injured person say was cause of accident? Air from motor blew something in eye.

B. In whose hearing was statement made? O. C. Pauff.

23. Was injured person insane, intoxicated, blind or deaf? No.

24. Was anyone at fault? If so, who? Boilermakers could have covered exhaust from motor.

25. Name, occupation, postoffice address and residence of every person who witnessed the accident, or can give any information regarding it. (Attach hereto the written statements of such persons, signed by each). Occupation, ——. Name, ——. Residence and P. O. (Give street and number), ——.

26. Remarks: State fully any further information, you can.

NOTE.—Was not advised of accident until this date. W. A. Keith.

(Sign here:)

O. J. BURTON,

(Occupation:)

Machinist,

(Address:)

1535 Hudson Ave., L. A.

Month. Day of month.

(Dated:) March 25th, 1919.

104

DEPT.'s 2.

Los Angeles & Salt Lake Railroad Company.

Safety Rules for Shopmen.

1. The best safety device known is a careful man.
2. The greatest number of accidents are due to thoughtlessness or carelessness of yourselves or fellow workmen. These are largely preventable by you.
3. Guard against errors of judgment on part of others as well as yourself.
4. Do not touch any wires or apparatus until you know it is safe to do so. If in doubt consult your superior officer.
5. High tension insulation must not be touched.

6. Use all safeguards provided.
 7. Employees placing safeguards for their protection are the only ones who should remove them. Any others removing them or making them ineffective will be subject to dismissal.
 8. Do not wear loose, baggy clothing which is liable to be caught in machinery.
 9. Do not do any chipping or grinding without wearing safety goggles. If you are not provided with goggles, go to Foreman.
 10. Do not open or close an electric switch until you know it is safe to do so.
 11. Report at once to Shop Foreman any dangerous practice or conditions you may notice.
 12. Report in writing all accidents coming under your observation.
 13. Do not neglect any injuries received, however trivial. It is your duty to take care of all injuries promptly.
 14. Examine carefully all tools you use. You are the best judge of their condition. If they are not safe, do not use them.
 15. Protect yourself and others from flying chips, rivets, bolts, etc.
 16. Examine carefully all ladders, scaffolding, ropes, staging and slings before using.
 17. Do not get off or on moving cars or engines.
 18. Examine closely all handled tools before using.
 19. Keep from under material being handled by over-head hoists.
 20. Do not open blow off cock or any other boiler attachment until you know there is no one in danger.
- Always be careful.

105 Before the Industrial Accident Commission of the State of California.

Claim L. A. No. 762.

O. J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General of Railroad, United States Railroad Administration, and Los Angeles & Salt Lake Railroad Company, a Corporation, Defendants.

Findings and Award.

Industrial Accident Commission State of California. Filed December 1919, at — min. past — o'clock — M. By H. L. White, H.

This cause came on for decision by the Industrial Accident Commission of the State of California at its office at 525 Market Street, San Francisco, California, on the 3rd day of December, 1919.

Said decision was rendered upon testimony and stipulations taken at a preliminary hearing held on the 22nd day of July, 1919, at 2 o'clock p. m., at Room 405 Union League Building, Los Angeles, California, by F. W. Fellows, Referee.

At said preliminary hearing the applicant appeared in person. Defendants were represented by Dana T. Smith and E. E. Bennett, attorneys at law.

The cause having been submitted for decision, this Commission makes its Findings and Award as follows:

Findings of Fact.

1. That O. J. Burton, hereinafter called the employee, the applicant herein, was injured on the 1st day of February, 1919, at Los Angeles, California, while in the employment of defendant Walker D. Hines, as Director General of Railroads, United States Railroad Administration, hereinafter called the employer as a machinist.
2. That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to the same, and happened in the following manner: While tapping the boiler of an engine, a piece of steel lodged in his left eye, blown by the exhaust from a compressed air holder near him where other men were at work:
3. That at the time of said injury the employee was not engaged in any of the occupations or employments excluded by Section 8 of the Workmen's Compensation, Insurance and Safety Act of 1917 from the provision of said Act, and the employee and the employer were subject to the compensation provisions of said Act and to the jurisdiction of this Commission:
4. That the employer did not have notice or knowledge of the said injury or of the assertion of a claim of said injury, as defined by Section 15 of said act, but that there was no intention to mislead or prejudice the employer in making his defense, and the employer was not in fact so misled or prejudiced by failure to give such notice;
5. That the medical, surgical and hospital treatment required to cure and relieve the employee from the effects of said injury was in part provided by the employer; that the employer neglected and refused seasonably to provide the entire treatment required to cure and relieve the employee from the effects of said injury; that applicant is therefore entitled to have paid by the employer the reasonable medical and surgical charges incurred on the employee's behalf for services rendered in the removal of his infected teeth and the treatment of the sockets thereafter; that the replacement of the extracted teeth was not necessary to cure and relieve the employee from the effects of said injury, and the cost of the same is therefore not properly chargeable to said employer.
6. That the daily earnings of the employee at the time of said injury were five dollars and forty-four cents (\$5.44) for employment at days per week; that the average weekly earnings were thirty-one dollars and one cent (\$31.01) and 65 per cent thereof is twenty dollars and sixteen cents (\$20.16);

7. That by reason of said injury the employee sustained a temporary total disability lasting from the 1st day of February, 1919, the duration whereof was not determinable at the time of the last hearing or medical examination in this case; that compensation at the rate of twenty dollars and sixteen cents (\$20.16) per week was due and payable to the employee on account of said disability from the eleventh day after he left work on account of said injury (February 12th, 1919) until the termination of his disability or the further order of this Commission; that such compensation accrued and payable up to and including the 22nd day of July, 1919, a period of twenty-three weeks, is the sum of four hundred sixty-three dollars and sixty-eight cents (\$463.68), on account of which there has been paid the sum of two hundred eighty-two dollars (\$282.00) leaving due and unpaid the sum of one hundred eighty-one dollars and sixty-eight cents (\$181.68);

8. That the evidence herein is insufficient to establish as a fact that said injury was caused by serious and wilful misconduct on the part of the employee, or that he was guilty thereof;

9. That the engine upon which he was at work had been theretofore used in interstate commerce, but during the period from the 19th day of December, 1918 to the 21st day of February, 1919, said engine was withdrawn from any and all service for repairs, was not then an instrument of or engaged in any commerce, and the employee was not engaged in interstate commerce, and both employer and employee were subject to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act and to the jurisdiction of this Commission.

Award.

Now, therefore, award is hereby made in favor of O. J. Burton, the applicant herein, against Walker D. Hines, as Director General of Railroads, United States Railroad Administration, one of the defendants herein, of a temporary total disability indemnity, payable as follows:

1. The sum of one hundred eighty-one dollars and sixty-eight cents (\$181.68) forthwith;

2. The further sum of twenty dollars and sixteen cents (\$20.16) a week, beginning with the 23rd day of July, 1919, until the termination of said disability or the further order of this Commission and

It is ordered that as to defendant Los Angeles and Salt Lake Railway Company, a corporation, this proceeding be and it is hereby dismissed.

[SEAL.]

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA.

A. J. PILLSBURY,
WILL J. FRENCH,

Commissioners.

Dated at San Francisco, California, this 17th day of December, 1919.

Attest:

H. L. WHITE,
Secretary.

109 Before the Industrial Accident Commisison of the State of California.

Claim L. A. No. 762.

O. J. BURTON, Applicant,

v.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railway Company, a Corporation, Defendants.

Petition of Walker D. Hines for a Rehearing.

Industrial Accident Commission, State of California. Filed Jan. 2, 1920, at 55 Min. Past 2 o'clock p. m. F. W. Fellows, by E. J.

To the Honorable the Industrial Accident Commission of the State of California:

Walker D. Hines, Director General of Railroads, United States Railroad Administration, operating Los Angeles & Salt Lake Railroad, within the time provided by law therefor, hereby makes his application for a re-hearing of said cause, upon the following grounds, namely:

Grounds.

1. That the Commission acted without, or in excess of, its powers
2. The evidence does not justify the findings of fact.
3. The findings of fact do not justify the order, decision or award.

Recitals.

The application for adjustment of claim herein was filed on or about the 3rd day of July, 1919, and served on the defendant on or about the 5th day of July, 1919. In said application, Los Angeles & Salt Lake Railroad Company, a corporation, was named as
110 a party defendant, but under the findings and award of this Commission, the proceedings were dismissed as to said corporation, and the latter will therefore no longer appear as a party defendant.

The answer of defendant Walker D. Hines, within the time allowed by law, and the extension thereof lawfully granted, was served on the 10th day of July and filed on the 11th day of July,

1919. A hearing herein was had before F. W. Fellows, Referee, on the 22nd day of July, 1919, at the office of the Commission in the City of Los Angeles, California. Findings and award were filed on the 17th day of December, 1919, and the defendant received a copy thereof by mail on or about the 19th day of December, 1919.

The Application for Adjustment of Claim.

So far as is necessary to refer thereto, the application reads as follows:

"II.

* * * * *

That a dispute has arisen concerning jurisdiction, and defendants allege that applicant's injury arose out of and in the course of employment incidental to interstate commerce. Defendant's contention is incorrect in that the engine upon which the applicant was working at the time of said injury was withdrawn from service for repairs for a period of approximately 30 days and was so withdrawn at the time of the said injury.

III.

* * * * *

4. Place of injury. Employer's Los Angeles Shops.

5. Nature of work on which injured person was engaged at time of injury. Drilling and tapping boiler of engine.

6. How did injury occur. (Describe in detail.) While doing as aforesaid, a piece of steel lodged in applicant's left eye."

The Answer.

111 So far as is necessary to refer thereto, the answer to the application for adjustment of claim reads as follows:

* * * * *

"That the line of the defendant Railroad Company, now in the possession, use, operation and control of the defendant Walker D. Hines, runs in and between the States of Utah, Nevada and California, and said defendant Walker D. Hines is engaged as a common carrier of freight and passengers in Interstate Commerce; that said applicant at the time of the alleged injury was engaged in interstate commerce, to wit: in repairing a locomotive used by said defendant Walker D. Hines in interstate commerce; that this Honorable Commission, therefore, has no jurisdiction in this matter."

* * * * *

Wherefore, your defendants pray that said application be dismissed, and for such further relief as to this Commission may seem just."

Findings and Award.

So far as is necessary to consider them herein, the findings are as follows:

* * * * *

"3. That at the time of said injury the employee was not engaged in any of the occupations or employments excluded by Section 8 of the Workmen's Compensation, Insurance and Safety Act of 1917, from the provisions of said Act, and the employee and the employer were subject to the compensation provisions of said Act and to the jurisdiction of this Commission.

* * * * *

9. That the engine upon which he was at work had been theretofore used in interstate commerce, but during the period from the 19th day of December, 1918, to the 21st day of February, 1919, said engine was withdrawn from any and all service for repairs, was not then an instrument of or engaged in any commerce, and the employee was not engaged in interstate commerce, and both employer and employee were subject to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act and to the jurisdiction of this Commission."

An award was made in favor of the applicant and against the defendant for the sum of \$181.68, payable forthwith, and the further sum of \$20.16 a week beginning with the 23rd day of July, 1919, until the termination of said disability or the further order of this Commission.

112

The Evidence.

Certain facts were established by stipulation, and it is unnecessary to refer to them herein. The sole issue in this case, and the one upon which the petition for a re-hearing is based, is to ascertain whether, at the time of the injury, the applicant and the defendant were engaged in interstate commerce.

O. J. BURTON,
Applicant.

The evidence of the applicant is of very little assistance to us, so far as the sole issue in the case is concerned. He testified that he was working on the boiler of the engine, which he believed was No. 3673; that it had been in the shops at least two weeks; that it had been undergoing what he called general repairs; that the engine in question was one of the large freight engines.

O. C. Pauff, a witness called on behalf of defendant testified that he was Clerk to the General Foreman at the shops of the Salt Lake Railroad at Los Angeles; that he was so employed at the time of

this injury; that the engine in question upon which applicant was employed was No. 3673; that it came into the shops on the 19th day of December, 1918.

"Q. Can you state from your records the nature of the repairs?

A. Class 3-C.

Q. What do you mean by Class 3-C?

A. Class 3 would be engine for general overhauling and flues, and the C would indicate superheater, application of superheater. That is Government Classification.

* * * * *

— Will you read the entries in respect to 3673, for each week it was in the shop?

A. There is one for December 28th, showing engine 3673 going into shop; 12-19 estimated out, 1-30.

The Referee: You mean January 30th?

A. Yes, January 30th,—January 4th, 3673, date taken in shop, 12-19; date estimated out, January 30th. Class 3-C.

113 Mr. Smith: Class 3-C, Remarks * * *

A. Waiting for material.

Q. That was delay in superheating?

A. Yes—on January 11th, 3673 taken into shop 12-19; date estimated out, 1-30, Class of repairs, 3-C.

Q. Anything under remarks?

A. No remarks.

Q. Were the entries under date taken in and estimated out are the same, just give us the remarks.

A. On January 18th, Engine 3673, date taken in, 12-19; it is the same as the other report. On January 25th, 3673, 12-19 date taken in, and the date estimated out is 2-15.

Q. What have you under remarks?

A. Delayed on account of material. January 1, 3673, date taken in shop, 12-19; date estimated out, 2-15; Class 3 repairs; delayed for material; February 8th, shows the same information, waiting for material. On February 15th, it shows engine taken in shop 12-19; date estimated out 2-22, Class 3-C repairs. Remarks, waiting for material. February 22nd turned out of shop, Engine 3673, as taken in shop 12-19; date turned out of shop 2-21, Class 3-C repairs.

The Referee: Are these reports that you have been reading from daily reports of engines in the shops?

A. Weekly.

Q. It is labeled "Daily Reports," but as a matter of fact you make one each week?

A. Yes, one each Saturday.

Q. Do you know whether this engine had a regular run or not?

A. It was assigned to the desert.

Mr. Bennett: What do you mean by that?

A. Out on the desert at Las Vegas, Nevada.

The Referee: Where would the run carry it?

A. It would take it from Yermo, California, to Caliente, Nevada.

Mr. Pauff further testified that immediately after this engine was taken from the shops, it was given the usual trial trips in the yards, and then on February 25th, it was attached to the San Pedro Local Freight train. In this connection he further stated that it was customary to test freight engines on some local run after undergoing repairs before they were returned to their regular runs. He then stated in answer to a question as to there engine 3673 went after being tried out on the San Pedro Local:

"Q. It went out on the next trip east on March 4th?

A. Yes sir.

Q. And has not since returned?

A. No sir.

Q. In regard to this trip on the San Pedro local, was that also in the nature of breaking the engine in before it went
114 back on its assigned run?

A. Yes sir.

Q. Do you do that to other engines that are at the shops here in Los Angeles?

A. Yes.

Q. Did you state that prior to the time it was brought into the shop it was assigned to the desert district, running out of Las Vegas, Nevada?

A. Yes sir.

Q. What character of service was it in, freight or passenger?

A. Through freight service.

Q. Are all the through freight trains which go out of Las Vegas, Nevada, interstate trains?

A. Yes.

Q. Operating through California, Nevada and Utah?

A. Nevada and Utah.

Q. There is a local which operates out of Las Vegas, running from Las Vegas, Nevada, to Yermo, California?

A. No, it runs to Kelso, California.

The Referee: Was this engine used on that local?

A. 3654 was the regularly assigned engine on that run.

Q. This engine may have been used on that local.

A. It might have been at some time.

Q. But the local runs from Las Vegas, Nevada, to Kelso, California?

A. Yes sir.

Q. Do you know in a general way the character of freight which is handled on that local; that is a local freight, isn't it?

A. Yes sir.

Q. It is not a local passenger train?

A. No, no.

Q. Do you know generally the character of freight which is handled on that?

A. They have all those pick-ups at Arden; along the line they pick up.

Q. Is it freight going from one state to another?

A. Yes, they pick up that freight and then put it in the regular train going through.

Q. It is picked up by the local along between Las Vegas and Kelso and then put in the regular through trains?

A. Yes.

Q. That is, generally speaking?

A. Yes.

Q. Do you know whether or not this engine has been returned that character of service and has ever since March 4th?

A. It was returned from here."

C. N. Essender, testifying on behalf of defendant, stated that he was Chief Dispatcher for defendant for seven years, and was so employed at the time of the injury; that as such Chief Dispatcher it was his duty to order and place the movements of engines used by defendant, keeping, what he called, a train sheet, which was made up under his supervision. Testifying as to the character of the work done by engine 3673, he says:

"Q. Are you familiar with this engine 3673?

A. My record shows the movement of the engine prior to coming to the shop and after its dismissal from the shop.

Q. Did you have direction of the distributing of trains over the entire run?

A. All the territory extends to Caliente, beyond this point from East San Pedro to Caliente, Nevada.

Q. Caliente is beyond Las Vegas?

A. Yes, one district beyond Las Vegas.

Q. Mr. Essender will you state what character of service this engine 3673 was assigned prior to the time it came into the shops at Los Angeles along about the 19th day of December, 1918?

A. The record shows that it was in through freight service between Las Vegas, Nevada, and Yermo, California.

Q. Can you state whether or not we operate any other character of trains between Las Vegas, Nevada, and Yermo, California, in the freight service?

A. We operate a local between Las Vegas, Nevada, and Kelso, California.

Q. What character of freight does that local handle between Las Vegas and Kelso?

A. It handles not only through freight for tonnage, but it handles freight from other local points between Las Vegas and Kelso to Kelso and west.

Q. For Kelso and west?

A. Yes.

Q. So that all of the freight handled by that local would be interstate in character?

A. Oh yes.

The Referee: Is this Yermo on the main line or on the branch line?

A. Las Vegas is west of all terminals * * *

Q. They are both on the main line?

A. They are both terminals on the main line and Kelso is between these two points; the district is too long, so we send it to Kelso and turn it back from there every other day.

Mr. Smith: Do you know how long that engine had been assigned to that through freight service?

A. I couldn't say how long it had been in the service; I just brought the records back from October, and the sheet shows from October that it was in that service.

Q. I was asking you generally?

A. I couldn't say just exactly; it has been there for quite a time in that service.

The Referee: Was this one of the heavy freight engines?

A. One of our main line engines, yes.

Mr. Smith: After it was repaired in the shops at Los Angeles, was it returned to that same service?

A. After it was broke in sufficiently to put it in through service, it was returned to Las Vegas.

The Referee: You have heard the testimony of the witness that just preceded you to the records of the company; do you substantiate what he said about breaking in?

A. Yes sir.

116 Q. And the return to the same character of service after the breaking in?

A. Yes, these sheets will show when it left.

Mr. Smith: Your record shows it left for the east on March 4th, at 8 P. M.

A. Yes sir.

Q. And that it never has returned?

A. No sir.

Q. And that it has been in through service on the main line ever since?

A. Yes sir."

J. P. THOMAS, a witness on behalf of defendant, testified that he was Freight Agent at Los Angeles, and had the record showing the consists of the San Pedro Local to which engine 3673 had been attached on its trial trip, and that this record shows that the local contained at least six carloads of eastern freight for the San Pedro Branch, and returning contained at least three carloads of freight consigned to points in Nevada and Chicago, and that Train Extra East on March 4th, 1919, (the train which was hauled out by engine 3673) when it left for its desert run, contained five carloads of freight consigned to eastern points, and less than carload shipments consigned to points in Idaho, Utah and Nevada.

W. A. KEITH, a witness on behalf of defendant, testified that he was the General Foreman of the Mechanical Department of the Railroad; was familiar with engine 3673, and knew that it was in the shops during part of December, 1918, January, and part of February, 1919, undergoing general repairs.

"The Referee: Were these repairs necessary in order to keep the engine in running condition?"

A. It is necessary to put the engine in first class condition.

Q. Would it have been able to go on if these repairs had not been made, or was its rundown condition such as would interfere with its running?

A. It wouldn't be profitable to keep the engine in service; it would cost too much to keep it in repair.

117 Mr. Smith: It would have been possible to continue operating the engine for some time before it was generally overhauled, Mr. Keith, but running repairs would have had to be made constantly?

A. Constantly, yes sir.

Q. As a matter of economy it was better to have it overhauled and put in first class condition?

A. Yes sir."

Referring to the character of the work to which this engine was assigned, Mr. Keith testified:

"Q. Mr. Keith, you have heard the testimony of Mr. Essender and Mr. Pauf as to the character of service to which this engine had been assigned; is the testimony correct?"

A. Yes, it was.

The Referee: Do you know that this is the engine upon which the applicant was injured?

A. Yes sir.

* * * * *

Mr. Smith: Mr. Keith, you state that this engine had been regularly assigned to the main line freight service in interstate commerce prior to the time it was brought into the shops for this overhauling?

A. Yes sir.

Q. And after it left the shops and was broken in by being run light and run out on this local to San Pedro, it was returned to the same class of service?

A. Yes sir, it was.

Q. And has continued in that service ever since it left here on March 4th, 1919?

A. Yes.

The Referee: Do you know whether it did any switching or moving around Los Angeles yards before it was returned to the same service it had been in before?

A. No sir, it wasn't used for switching.

Q. When it was placed in the shop for repairs, what was the attention with respect to the use of the engine after it had been overhauled?

The Referee: Do you have anything to do with the ordering of this engine into the shop for repair?

A. Not that number.

Q. Did you have anything to do with the ordering of it out of the shop?

A. Yes sir.

Q. What?

A. When repairs were made, completed, I ordered it out of the shop.

Q. Did you have anything to do with designating what service it would go into when it left your hands?

A. Nothing more than from Mr. Merry, the Master Mechanic, I believe he wired me to send engine 3673 to Las Vegas for service.

Q. Did you see that telegram?

A. I believe I did; I didn't look it up but I believe I have the telegram.

Q. You mean he wired to you?

A. Yes sir; if he didn't do that, I sent the engine where it came from; I would do that, but I think he wired.

118 Q. The engine was sent to Las Vegas under your orders, was it?

A. Yes.

Q. Did you have yourself any intenton as to what was to be done with that engine after it left the shop excepting as your intention might have been governed by orders from your superiors?

A. I knew the engine was going back in the freight service.

Q. How did you know that?

A. Because it always had been in through freight service and I don't think we had anything but that class of engines.

Q. That was the conclusion that you drew from what you knew of its past history and the character of the engine?

A. Yes.

Mr. Smith: Would you have done that class of repairs on an engine if it had not been destined for that class of service in which it had been before?

A. The engine was due for that class of repairs; it was necessary to do that **class of repairs**.

The Referee: You did the work you were ordered to do on the engine?

A. I would say I had authority to send the engine to Las Vegas out of the shop.

Q. Whom did you get the authority from?

A. I had the authority.

Q. You had that authority by virtue of your position with the company?

A. Yes sir.

Q. When you got the engine into the shop for repair, did you have any intention as to what you would do with it after you got the repairs made?

A. Yes sir.

Q. What intention did you have?

A. The intention was to send it back to Las Vegas for freight service.

Mr. Smith: Is there any freight service out of Las Vegas which is not interstate in character? I mean by that, in which the freight would pass from one state into another state?

A. I am not well enough posted to answer that; the train sheets would show that.

The Referee: Did you have any instructions when the engine came into the shop for repairs as to what was to be done with it when the repairs were made?

A. Nothing more than the general understanding that it would be returned to the place from which it came.

Q. What do you mean by general understanding?

A. The same as we have on all that class of cars; that is through freight cars and they overhaul them and return them to through freight service.

Q. Did you receive any instructions from anybody as to what was to be done with that engine when the repairs were made?

A. No; I thought probably that I got a message from Mr. Merry. I am not sure whether I did or not; sometimes they are short of power out there and say 'Return engine 3673 to Las Vegas,' but unless I got some instruction of that kind, I would have authority to send the engine back from where it came.

Q. If you had not received any instructions in this case you would have sent it without any further — back to Las Vegas?

119 A. Yes sir; to make that a little clearer, if it had been an engine that belonged to some other district, we would notify the dispatcher that the engine was ready to go, and he would give us an order to run the engine out, probably double-head; that would be in order to give him a chance to give the train a little more tonnage with the double-header, arrange for the crew, and take the engine on to its destination."

Specifications why a Rehearing Should be Granted.

1. That the Commission acted without or in excess of its powers.

It appears from the evidence which we have quoted at some length above, that engine No. 3673, upon which the applicant, Mr. Burton, was working, had been brought in from an interstate run on which it had been engaged for some considerable time; was put in the repair shop, and immediately upon the completion of the repairs including the usual trial trip, again returned to the interstate run, and at the time of the trial herein was still so engaged.

2. The evidence does not justify the findings of fact.

3. The findings of fact do not justify the award, order or decision.

In this connection, as we have stated above, the material findings were, that the engine upon which the applicant had been working had theretofore been used in interstate commerce, but that during

the period from the middle of December, 1918, to the 21st day of February, 1919, said engine had been withdrawn from all service for repairs, and was not an instrument of or engaged in any commerce, and the employee was not engaged in interstate commerce, and both the employer and employee were subject to the provisions of the Compensation Act.

120 We believe that if the Commission will read over the quoted portions of the evidence hereinabove set forth, it will agree with is that that finding is in no way supported by the evidence, and particularly that part of the paragraph in which it is stated that the engine was withdrawn from any and all service, and was not an instrument of or engaged in any commerce. We believe that the cases hereafter cited are convincing to the effect that this engine was but temporarily set to one side; that its interstate business was temporarily interrupted for the purpose of making the necessary repairs which would enable it, and which did enable it, to return to an interstate run from which it had been brought. The evidence clearly brings forth the fact that the engine was intended to return to this interstate run, was destined for such a line of work, and was returned to that work immediately upon the completion of the repairs.

Argument.

We have quoted at some length the evidence given before the Commission, in view of the fact that the sole issue is one which relates primarily to the facts and occurrences which must be brought out by questions and answers, and which are more clearly brought out by actual quotation of such questions and answers rather than by any general statement which we might be able to make as to the substance thereof. We do not desire to tire the Commission by many citations sustaining our position in the matter, although there are numerous authorities which we are sure will sustain our contention that the applicant in this particular case, considering the facts brought out before the Commission, was engaged in interstate commerce.

121 One of the early cases was that of *No. Pac. R. R. v. Maerkl*, 198 Fed. 1, decided in 1912. In this case it was stipulated by the parties that the car upon which the employee, Maerkl, was injured, was a refrigerator car and had been used indiscriminately in intrastate and interstate transportation, and that at the time of the injury it was being repaired in the yards for use in interstate and intrastate commerce as occasion might arise. In discussing the case, the court said "that a car so used is one of the instruments of interstate commerce does not admit of a doubt". And after quoting from earlier cases, the court continues:

"It was equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of

traffic, or of any of the operators who thereafter handle it in such traffic."

It will be noted in this case, that according to the stipulation, this car, after being repaired, was to be used in interstate and intrastate commerce as occasion might arise. In the case at bar there was no such indefinite purpose with respect to engine 3673. The evidence shows that it had come direct from an interstate run and returned directly to its intrastate run. That return was not a matter of chance or probability, but it was according to the destined purpose and duties of the engine, and according to the intention of the foreman who had charge of the direction and duties of this engine. Clearly, if a car which might be used indiscriminately is intrastate and interstate commerce is held to be an instrumentality of that commerce, even more clearly must it appear that an engine having a fixed and definite interstate run must be held to be an instrumentality of interstate commerce under the Federal Employers' Liability Act.

122 In *Law v. Ill. Cent. R. R.*, 208 Fed. 869, the employee was a boilermaker helper, who was repairing a freight engine regularly employed by the defendant in interstate commerce. In discussing this matter, the court said:

"It is the well settled rule that in order to bring a railroad employee within the protection of the Employers' Liability Act, it is not necessary that he be directly engaged in train movement", citing the *Petersen* case, 229 U. S. 146.

Continuing, the court says:

"There can be no doubt that railroad employees are within the purview of the Employers' Liability Act while engaged in the repair of engines, cars, bridges, tracks and switches actually used in interstate commerce", citing *Walsh v. N. Y. N. H. & H. R. R.*, 222 U. S. 53.

The Court then continues:

"In the instant case the engine was in the shop for what is called 'round-house overhauling'. It had been dismantled at least 21 days before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It actually was so returned the day following the accident. It clearly did not lose its interstate character from the mere fact that it was not at the time actually engaged in interstate commerce, no more than did the dining car in *Johnson v. So. Pac. R. R.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, while waiting for a train to make the return trip, or than did the car in the *Walsh* case while standing on a track awaiting replacement of the drawbar. Were the repairs being made in the round house between two regular daily trips, the engine, while under such repair would clearly not lose its character as an instrumentality of interstate commerce; and plaintiff, in such case, would have been engaged in interstate commerce. We have not here a case of original construction of an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and was

such character. Its preservation as such was not a matter of indifference to defendant, so far as its interstate commerce was concerned. See *Pedersen Case*, 229 U. S. 151-152, 33 Sup. Ct. 648, 57 L. Ed. 1125. Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days' temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in a roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character? As held in the *Pedersen Case*, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in proper state of repair while thus used is 'so clearly related to such commerce as to be in practice and in legal contemplation a part of it.'

123 In the *Law case*, the engine had been undergoing general overhauling and had been dismantled at least 21 days. In the case at bar the engine was undergoing what is known as Class 3-C repairs, which, in the ordinary course of events would have taken from 30 to 35 days. Due, however, to inability to secure the necessary parts, the engine was in the shops approximately two weeks longer. Can it be said that there is any material difference between the engine in the *Law case* and the one in the case at bar?

In the case of *Roush v. B. & O. R. R.* 243 Fed. 712, the doctrine of interstate commerce is extended to an employee of an interstate railway who is engaged in operating a pumping station which furnished water indiscriminately to locomotives engaged in interstate and intrastate commerce.

The case of *Atlantic Coast Line v. Woods*, 252 Fed. 428, involved an injury to an employee who was operating a machine used to cut threads on a bolt which had come out of an engine used in interstate commerce. The court cites the case of *N. & W. Ry. v. Earnest*, 29 U. S. 114, which involved an injury to an employee while piloting a locomotive through a railroad yard, and stated:

"However, in this instance it cannot be said that the employee is directly engaged in interstate commerce; nevertheless, he was performing work which was necessary to the preparation of the engine which had been, and was to be, used in such commerce".

In this case the court distinguishes the *Winters case*, 242 U. S. 353, saying:

"The case at bar, as we have stated, is distinguishable from the cases relied upon by counsel for plaintiff, inasmuch as the engine was taken out of interstate commerce for the express purpose that it might be repaired to enable it to continue as such instrument of interstate commerce. In other words, it is easily distinguished from the *Winters case* because the character of the work in which the engine in this instance was employed did not depend upon remote possibilities or upon accidental later events'. It appears from the evidence that engine 88 was regularly engaged in

hauling interstate passenger trains, operating under a rule of the road by which it reached Florence every three days. It further appeared that on the day plaintiff was injured this engine was taken out of the Columbia-Wilmington train in order that the U-bolt in question might be repaired. It also appears that the engine was placed in the shop and sent out upon the same day on its regular run hauling what is known as the Columbia-Wilmington train."

The case of *Kuchenmeister v. L. A. & S. L. R. R.*, 172 Pac. 724, decided by the Supreme Court of Utah, arose out of an injury suffered by plaintiff while working on one of defendant's passenger engines which had been used in interstate commerce. In a very lengthy opinion the court held that plaintiff could not avail himself of the Federal Employers' Liability Act, citing with approval the *Law Case*, supra.

The Supreme Court of California in the case of *So. Pac. Co. v. Ind. Acc. Comm.*, 175 Pac. 463, extended the doctrine to a member of a repair gang, who had been making light repairs upon cars sidetracked in a yard used indiscriminately for intrastate and interstate commerce, although the man was not killed while actually working on such cars, but while crossing the tracks in the repair yard.

A very recent case, that of *Cent. R. R. of N. J. v. Sharkey*, decided Feb. 2nd, 1919, by the U. S. District Court for the Southern District of New York, reported in 259 Fed. 144, is, we believe, very pertinent to the case at bar. In this case the employee had been repairing interstate cars, and had made a trip to get certain bolts to continue his repairs. Having secured the bolts, he was returning to repair a specific interstate car when he was struck
125 by an engine. The court stated that the man was engaged in interstate commerce, and, in reply to the statement by counsel that the *Winters Case* was decisive of the question, the court stated:

In *Minneapolis & St. Louis Railroad Co. v. Winters*, 242 U. S. 353, 37 L. Ed. 358, Ann. Cases, 1918B, 54, the injury occurred while the plaintiff was repairing an engine. The engine had been used in interstate commerce before the injury, and was so used afterwards; but there was nothing to show that it was permanently and specially devoted to such commerce, or assigned to it at the time, and it was held that the case was not within the Federal Employers' Liability Act. And it is said that the *Winters case* requires to reverse the instant case. But this is to overlook the fact that there is evidence in this record, received without objection or exception, that this plaintiff at the time of the injury was in the State of New Jersey and on his way to complete in that State repairs on a car which belonged to the Pennsylvania Railroad and which was "a rush order for Philadelphia." It is not necessary to comment further upon this phase of the case. But we may remark that in the *Winters case* the engine which was used was not repaired at all for three days following the accident, and that the court in its opinion proceeded on the ground that no interstate movement was immediately in contemplation at the time when the repairs were made. And in *Great Northern Railway Company*

Otis, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. Ed. 322, the Supreme Court held that a car coming from another state and whose interstate movement is arrested to permit repairs fitting it to meet its destination, is not by reason of such delay withdrawn from interstate commerce."

The same court in the case of *Erie Railroad Co. v. Szary*, 259 Fed. 178, held that an employee, engaged in sanding engines, was employed in interstate commerce, although there was no specific showing whether the engines in question were to be used in interstate or intrastate commerce.

The Supreme Court of the United States in the case of *Minn. & St. L. R. R. v. Winters*, 242 U. S. 353, considered this question in a very brief opinion, which opinion has been used as a basis for statements by counsel for employees, that a mechanic working on an engine is not engaged in interstate commerce. We believe that a careful reading of that opinion will convince this Commission that such is not the holding of the *Winters* case, nor was it the intention of the Supreme Court to lay down such a general rule. In the opinion in that case Mr. Justice Holmes states that the case was brought before the court upon an agreed statement of
126 facts embraced in a few words. This brief statement was as follows:

"This engine 'had been used in the hauling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury'. The last time before the injury on which the engine was used was on October 18th, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, not upon remote possibilities or upon accidental later events."

It will be noted that there is no evidence that the engine in question was destined to any particular service. There was no evidence that the engine had been temporarily withdrawn from an interstate run to be returned thereto upon completion of repairs. The court emphasizes the fact that there is no evidence that this engine was destined for any particular haul; that it might be confined to intrastate business, or that it might be assigned to an interstate run. In short, Mr. Justice Holmes states that its character as an instrument of commerce depended upon mere remote possibilities.

In the case at bar engine No. 3673 had come from an interstate

run in which it had been engaged for some considerable time. In fact, so far as the evidence shows, this engine had been used continually for hauling an interstate freight train. The testimony clearly shows that it was the intention to return it to this interstate run; that such was the intention of the foreman, whose powers included the right to assign such engine to certain particular runs, and that after the usual trial trip it was returned to its regular interstate run from which, so far as the evidence shows, it had never been taken, and was only taken for temporary repairs to enable it to continue in that run.

Under the circumstances, we maintain that the Winters case does not govern the case at bar, and that the cases cited supra, handed down by the Federal Courts of this country, irresistibly lead one to the conclusion that the applicant was engaged in interstate commerce at the time of his injury.

Wherefore, your petitioner prays that this petition may be duly considered; that a re-hearing of said case may be granted; that the findings and award heretofore made and entered be set aside, and that the application for compensation be denied.

Respectfully submitted,

WALKER D. HINES,

Director General of Railroads.

By DANA T. SMITH,

E. E. BENNETT,

Attorneys for Petitioner.

Dated, January 2nd, 1920.

128 STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. H. Comstock being by me first duly sworn, deposes and says that he is the Asst. Gen. Mgr. of the petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are herein stated upon his own information or belief, and as to those matters that he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me this 2nd day of Jan. 1920.

[SEAL.]

EUGENE E. BENNETT,

*Notary Public in and for the County of
Los Angeles, State of California.*

129 *Affidavit of Service by Mail.*

Before the Industrial Accident Commission of State of California

No. L. A. 762, Dept. —.

O. J. BURTON, Applicant,

v.

WALKER D. HINES et al., Defendant.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Francis J. Mieding being duly sworn, deposes and says: That he is a citizen of the United States, over the age of eighteen years

and not a party of this action; that he is clerk of Dana T. Smith, who is one of the attorneys for the Petitioner in this action; that this affiant and said Dana T. Smith reside and have their office in the City of Los Angeles, County of Los Angeles, State of California; that O. J. Burton — the Applicant in this action, and that he resides at 1535 Hudson Avenue, in the City of Los Angeles, County of Los Angeles, State of California; that each of said two places there is a United States Post Office, and between said two places there is a regular daily communication by mail.

That on the 2nd day of January, 1920, affiant served a true copy of the Petition for rehearing, (to the original of which this is attached), on said O. J. Burton, said Applicant by depositing said copy on said date, in the post office at Los Angeles, California, properly enclosed in an envelope addressed to said O. J. Burton at his said place of residence above named, the postage thereon being prepaid.

FRANCIS J. MIEDING.

Subscribed and sworn to before me this 2nd day of January, 1920.

[SEAL.]

EDWARD E. BENNETT,
Notary Public.

130 Before the Industrial Accident Commission of the State of California.

Claim L. A. No. 762.

O. J. BURTON, Applicant,

vs.

WALKER D. HINES, Director General of Railroads, United States Railroad Administration, and Los Angeles & Salt Lake Railway Company, a Corporation, Defendants.

Order Denying Petition for Rehearing.

Industrial Accident Commission State of California. Filed Jan. 22, 1920, at — min. past — o'clock — m. By H. L. White. H.

Walker D. Hines, as Director General of Railroads, United States Railroad Administration, having petitioned this Commission for a rehearing of the Findings and Award heretofore entered herein, on the ground that the evidence does not sustain the Findings of Fact that the employee was not engaged in interstate commerce; and

It appearing to the satisfaction of this Commission that said contention has been fully considered and properly decided,

It is hereby ordered that said petition for rehearing, be, and it is hereby, denied.

[SEAL.]

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA.

A. J. PILLSBURY,
WILL J. FRENCH,
A. H. NAFTZGER,

Commissioners.

Dated at San Francisco, California, this 22nd day of January, 1920.

Attest:

H. C. WHITE,
Secretary.

131 In the District Court of Appeal of the State of California in
and for the Second Appellate District.

Second Civil, No. 3296.

WALKER D. HINES, as Agent under Section 206, Subdivision (b)
of the Transportation Act, Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA
and O. J. BURTON, Respondents.

Substitution of Parties.

It is hereby stipulated, that John Barton Payne, as Agent under section 206, subdivision (b) of the Transportation Act, may be and the same is hereby substituted in the above entitled cause, in the place and stead of Walker D. Hines, as Agent under section 206, subdivision (b) of the Transportation Act, and that the title of said proceeding be so amended.

Los Angeles, California, June 14, 1920.

FRED E. PETTIT, JR.,
E. E. BENNETT,
Attorneys for Petitioner.
A. E. GRAUPNER,
Attorney for Respondents.

It is by the court so ordered.

June —, 1920.

FINLAYSON,
Presiding Justice.

Filed June 22, 1920.

W. D. SHEARER,
Clerk.

132 District Court of Appeal, Second Appellate District, State of California, Division Two.

Civ., 3296.

JOHN BARTON PAYNE, as Agent, etc., Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

By THE COURT:

The briefs provided for by the order entered herein April 6, 1920, and extensions thereafter granted, having been filed in accordance with such order, the above entitled cause is submitted for decision.

Dated Aug. 9, 1920.

FINLAYSON,
Presiding Justice.

Filed Aug. 9, 1920.

W. D. SHEARER,
Clerk,

H. C. LILLIE,
Deputy.

133 *Judgment of District Court of Appeal, Second Dist.*

Second Appellate District, Division Two, November 26, 1920.

Civil, No. 3296.

JOHN BARTON PAYNE, as Agent under Section 206, Subdivision (b) of the Transportation Act, 1920 (Substituted for Walker D. Hines), Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON, Respondents.

In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled.

WELLER, J.

We concur:

FINLAYSON, P. J.

THOMAS, J.

- 134 *Minute Order of District Court of Appeal, Second District,
Denying Petition for Rehearing.*

Los Angeles, Dec. 24, 1920.

Division Two.

3296.

PAYNE

v.

INDUSTRIAL ACCIDENT COMM. et al.

BY THE COURT:

Petition for rehearing denied.

135 I, W. D. Shearer, Clerk of the District Court of Appeal of the State of California, Second District, do hereby certify that the preceding are true and correct copies of Minute Order Denying Rehearing, Decision of the Court, Petition for Writ of Review, Memorandum on Petition for Writ of Review, Order that Writ Issue, Writ of Certiorari, Return of the Industrial Accident Commission to Writ, Stipulation for Substitution of Petitioner and Order thereon, and Order to Submit, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 7th day of February. A. D. 1921.

[SEAL.]

W. D. SHEARER,
Clerk.

(3267)

In the Supreme Court of the United States, October Term, 1920.

No. 737.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA
and O. J. BURTON, Petitioners,

vs.

JOHN BARTON PAYNE, as Agent under Section 206, Transportation
Act, 1920 (Los Angeles and Salt Lake Railway Company),
Respondent.

It is stipulated by and between counsel for petitioners and respondent, that the certified transcript of record now on file in the office of the clerk of the Supreme Court of the United States in this matter, may constitute the return of the Clerk of the District Court of Appeal of the State of California, Second Appellate District, to the writ of certiorari issued by the Supreme Court of the United States in the above entitled matter, and directed to said District Court of Appeal.

It is further stipulated that the attached list of corrections of typographical errors may be added to said certified transcript of record on file, and shall constitute part of the return to said writ of certiorari.

WARREN H. PILLSBURY,
Counsel for Petitioners.
A. S. HALSTED,
FRED E. PETTIT, JR.,
E. E. BENNETT,
Counsel for Respondent.

In the Supreme Court of the United States, October Term, 1920.

No. 737.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA
and O. J. BURTON, Petitioners,

vs.

JOHN BARTON PAYNE, as Agent under Section 206, Transportation
Act, 1920 (Los Angeles and Salt Lake Railway Company),
Respondent.

*List of Corrections of Typographical Errors Appearing in Printed
Record in Above-entitled Proceeding and Referred to in Attached
Stipulation Concerning Return of Clerk of District Court of Appeal
and Writ of Certiorari in Above-entitled Matter.*

The following corrections are hereby made in the printed transcript of record in the above entitled proceeding.

1. On page 13, line 35, of printed transcript of record, the word "tri-l" should be corrected to read "trip".

2. On page 14, line 45, the word "engine" should be "entire".

3. On page 20, line 40, the word "helped" should be "helper".

4. On page 23, line 36, the word "basic" should be "basis".

5. On page 23, line 41, the word "law" should be "lay".

6. On page 25, lines 1 to 4 at the top of the page should be corrected to read as follows:

"2. That said matter and records be fully heard and considered by this court, and that it be ordered, adjudged and decreed that said award made by said Industrial Accident Commission against your petitioner, be annulled, vacated and set aside."

7. On page 33, line 12, the word "Cal." should be inserted after the word "Los Angeles."

8. On page 37, line 18, the word "Lake" should be inserted after the blank following the word "Salt".

9. On page 41, line 10, the word "employee" should be "employer".

10. On page 46, after line 35, four lines should be inserted after the words, "Q. What diagnosis did you make?", as follows:

"A. Ulcer of the cornea and iritis.

Q. Did you give him any treatments?

A. I did.

Q. Over how long a period?"

11. On page 64, line 28, the word "reight" should be "freight".

12. On page 87, line 32, the word "is" should be "in".

13. On page 88, line 8, the word "intrastate" should be "instate".

14. On page 92, line 37, the word "Eugene" should be "Edward".

15. On page 51, line 17, the word "Bauff" should be "Pauff".

16. On page 67, line 42, the word "treat" should be "tread".

17. On page 72, line 6, the words "February 3rd" should be "February 1st".

18. On page 82, line 16, the word "yestifying" should be "testifying".

19. On page 87, line 34, the word "oc" should be "of".

20. On page 87, line 40, the word "kight" should be "might".

21. On page 92, line 7, the word "particu-" should be "particular".

WARREN H. PILLSBURY,
Counsel for Petitioners.
 A. S. HALSTED,
 FRED E. PETTIT, JR.,
 E. E. BENNETT,
Counsel for Respondent.

In the District Court of Appeal in and for the Second District of the State of California.

I, W. D. Shearer, Clerk of the District Court of Appeal in and for the Second District of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of stipulation in regard to return to the writ of certiorari issued by the Supreme Court of the United States in Industrial Accident Commission of the State of California and O. J. Burton, petitioners vs. John Barton Payne, as Agent under Section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Company), respondents, filed in this office on May 20, 1921, as shown by the records of my office.

Witness my hand and the seal of the Court, this 20th day of May, A. D. 1921.

[Seal of District Court of Appeal, Second Appellate District, State of California.]

W. D. SHEARER,
Clerk.

In the District Court of Appeal, Second Appellate District, State of California, Division Two.

No. 3269.

JOHN BARTON PAYNE, as Agent under Section 206, Subdivision (b) of the Transportation Act, 1920 (Substituted for Walker D. Hines), Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON, Respondents.

I, W. D. Shearer, Clerk of the District Court of Appeal, Second Appellate District, State of California, Division Two, do hereby certify that the certified transcript of record now on file in the office of the Clerk of the Supreme Court of the United States, with the corrections noted in the attached stipulation, together with the attached stipulation, is a full, true and correct copy of the record of proceedings had before the District Court of Appeal, Second Appellate District, State of California, Division Two, in the above entitled cause.

Witness my hand and the Seal of the Court this 20th day of May, 1921.

[Seal of District Court of Appeal, Second Appellate District, State of California.]

W. D. SHEARER,
*Clerk of the District Court of
Appeal, Second Appellate Dis-
trict, State of California, Divi-
sion Two.*

In the District Court of Appeal, Second Appellate District, State of California, Division Two.

I, Frank G. Finlayson, Presiding Justice of the District Court of Appeal, Second Appellate District, State of California, Division Two, do hereby certify that W. D. Shearer is the Clerk of said District Court of Appeal, Second Appellate District, State of California, Division Two; that I am acquainted with the signature of said W. D. Shearer and that the signature to the foregoing certificate of attestation to the correctness of copy of stipulation filed in the case entitled John Barton Payne, as Agent under section 206, subdivision (b) of the Transportation Act of 1920 (substituted for Walker D. Hines etc.), petitioner, vs. Industrial Accident Commission of the State of California, and O. J. Burton, respondents, No. 3296, is the genuine signature of said Clerk, and that the seal attached to said certificate is the seal of said District Court of Appeal, Second Appellate District, State of California, Division Two, and that said attestation is in due form.

Witness my hand this 20th day of May, A. D. 1921.

[Seal of District Court of Appeal, Second Appellate District, State of California.]

FRANK G. FINLAYSON,
*Presiding Justice of the District Court
of Appeal, Second Appellate Dis-
trict, State of California, Division
Two.*

I, W. D. Shearer, Clerk of the District Court of Appeal, Second Appellate District, State of California, Division Two, do hereby certify that Frank G. Finlayson is the Presiding Justice of said District Court of Appeal, Second Appellate District, State of California, Division Two, and that the signature to the foregoing certificate is the genuine signature of said Presiding Justice.

Witness my hand and seal of the court this 20th day of May,
A. D. 1921.

[Seal of District Court of Appeal, Second Appellate District, State of California.]

W. D. SHEARER,
*Clerk of the District Court of Appeal,
Second Appellate District, State of
California, Division Two.*

[Endorsed:] 737—28,094.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the District Court of Appeal, Second Appellate District, Division Two, of the State of California, Greeting:

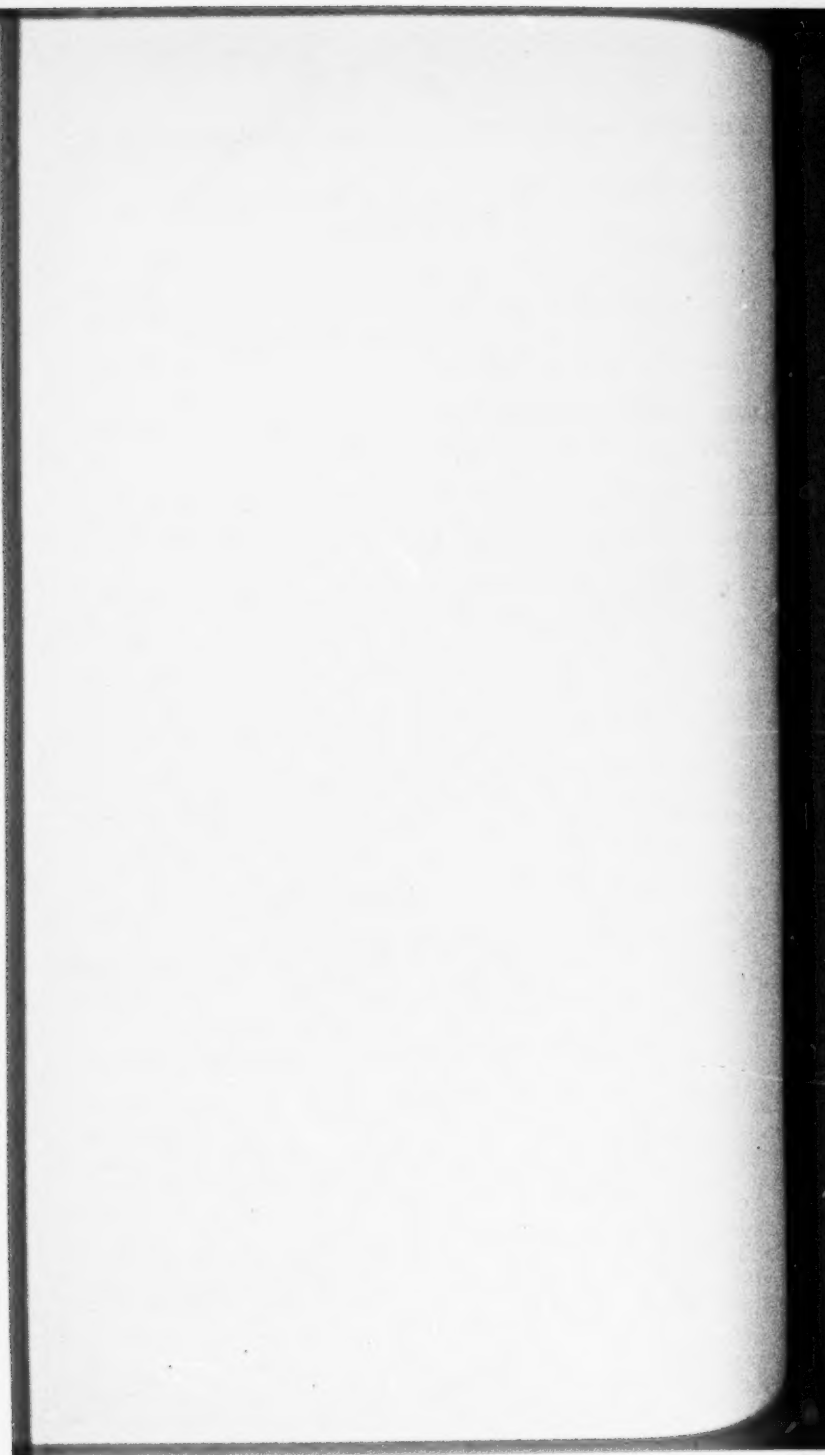
Being informed that there is now pending before you a suit in which John Barton Payne, as Agent under Section 206, Subdivision (b) of the Transportation Act, 1920, (Substituted for Walker D. Hines), is petitioner, and Industrial Accident Commission of the State of California and O. J. Burton, are respondents, Civil, No. 3296, which suit was removed into the said District Court of Appeal, by virtue of a writ of certiorari to the Industrial Accident Commission of the State of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said District Court of Appeal and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] 224—28,094. File No. 28,094. Supreme Court of the United States, October Term, 1920. No. 737. Industrial Accident Commission of The State of California et al. vs. John Barton Payne, as Agent etc. (Los Angeles & Salt Lake Railway Company). Writ of Certiorari.

[Endorsed:] File No. 28,094. Supreme Court U. S., October Term, 1920. Term No. 224. Industrial Accident Commission et al., Petitioners, vs. John Barton Payne, as Agent etc. Writ of certiorari and return. Filed June 11, 1921.



SEP 13 1914

STAMP

JOHN J. ... under ...

Respondent

STATE OF CALIFORNIA OF PETIT DEFENDANT
 AND ... OF ...

A. S. ...

ROD E. PETTY, JR.

222 South Main Street, Los Angeles, California

Counsel for Respondent

WARREN H. PHARMERY,

225 Market Street, San Francisco, California

Counsel for Petitioners

No. 224.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1921.

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA and
O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, as Agent under
Section 206, Transportation Act, 1920 (Los
Angeles and Salt Lake Railway Company),
Respondent.

MOTION FOR SUBSTITUTION OF PARTY DEFENDANT.

Now come counsel for petitioners and for respondent in the above entitled proceeding and respectfully move this Honorable Court for the substitution of James C. Davis, as Agent under section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Company), as respondent in this proceeding in the place and stead of John Barton Payne, as such Agent, resigned. This motion is based upon suggestion of the resignation of said John Barton Payne, and that said James C. Davis is his successor

in office, filed herein and a copy of which is attached hereto and incorporated in this motion.

WARREN H. PILLSBURY,
Counsel for Petitioners.

A. S. HALSTED,
FRED E. PETTIT, JR.,
Counsel for Respondent.

Dated: January 31, 1922.

No. 224.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1921.

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA and
O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, as Agent under
Section 206, Transportation Act, 1920 (Los
Angeles and Salt Lake Railway Company),
Respondent.

SUGGESTION OF CHANGE OF PARTIES.

Now come counsel for petitioners and respondent in the above entitled proceeding and respectfully suggest to your Honorable Court as follows:

1. Respondent John Barton Payne, as Agent under section 206, Transportation Act, 1920, has, since the entry of decision below in this case, resigned his office, and his successor in office is James C. Davis, Agent under section 206, Transportation Act, 1920.

2. It is hereby stipulated and agreed between the parties and suggested to your Honorable Court that

said James C. Davis, as said Agent, may be substituted as party respondent in this proceeding in the place and stead of said John Barton Payne, resigned.

WARREN H. PILLSBURY,

Counsel for Petitioners.

A. S. HALSTED,

FRED E. PETTIT, JR.,

Counsel for Respondent.

Dated: January 31, 1922.

DEC 7 1931

WM. H. STANBURY

Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1931

No. 326

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA and
O. J. BURTON

Petitioners,

JOHN BARTON PAYNE, as Agent under
Section 206 Transportation Act, 1920 (Los
Angeles and Salt Lake Railway Company),

Respondent.

PETITIONERS' BRIEF ON CERTIORARI

1

WARREN H. PILLSBURY,

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Counsel for Petitioners.

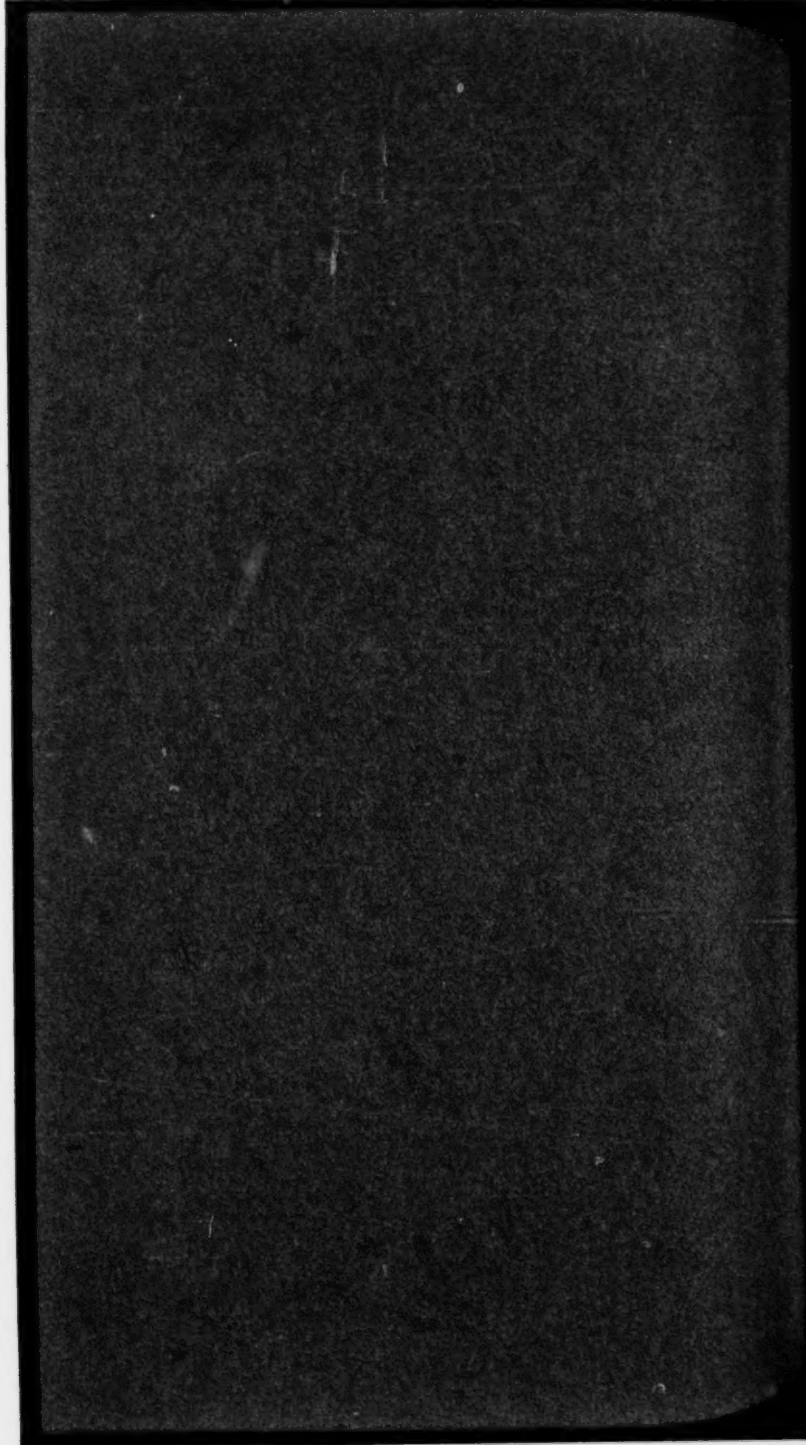


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 224.

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA and
O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, as Agent under
Section 206, Transportation Act, 1920 (Los
Angeles and Salt Lake Railway Company),
Respondent.

PETITIONERS' BRIEF ON CERTIORARI.

This case involves the single question of whether the claim for personal injuries of O. J. Burton, an injured employee and one of the petitioners herein, against the United States Railroad Administration, the employer, should be governed by the Workmen's Compensation Act of California (Chap. 586, California Statutes 1917) or by the Federal Employers' Liability Act (act of April 22, 1908, c. 149, 35 Stats. at L. 65, amended in respects not here material on April 5, 1910). The decision below annulled an allowance of benefits made under the state statute by the tribunal of first instance, the

Industrial Accident Commission of the State of California, upon the ground that the claim was governed by said federal act.

STATEMENT OF FACTS.

Said O. J. Burton was injured at Los Angeles, California, while working in the general repair shops of the Los Angeles and Salt Lake Railway Company, which railroad was then under federal control. The railroad was at all times engaged as a common carrier in interstate and intrastate commerce in the states of California, Nevada and Utah. At the time of his injury, Burton was repairing an engine which was being overhauled in said general shops, and the injury was caused by a piece of steel, blown from the exhaust of a compressed air motor operated by workmen near him, lodging in his eye and injuring the sight. The accident occurred on February 1, 1919.

The engine in question, which bore the number 3673, had been placed in the shops on December 19, 1918, for general overhauling, and the installation of a new superheating apparatus to increase the steam pressure. Such repairs, reconstruction and overhauling were not completed until shortly before February 25, 1919, when the engine was given a trial for several days in the yards of the company at Los Angeles. On March 4, 1919, it was again placed in service. At the time of the injury the engine was completely stripped and dismantled.

The pipes, jacket and all other removable objects had been taken off, the wheels were off and part of the fire box was out. (Printed record, page 49.)

The only other facts necessary to be stated deal with the character of service performed by the locomotive prior to its entry into the repair shop and subsequent to its return to service. There is no conflict in the evidence upon this point, although the District Court of Appeal below drew conclusions of law at variance with the determination of the Industrial Accident Commission as to the legal character of the engine. It appears without controversy that this locomotive was a road freight engine, built for ordinary use in moving freight trains on the main line of the road. For several months before the time it was shopped for repairs, it had been regularly assigned to and used on a through freight run extending from Las Vegas, Nevada, to Kelso, California. It, therefore, crossed from one state to the other on each trip. Upon its release from the repair shop on March 4, 1919, the locomotive was used on two short intrastate runs to be tried out, and thereafter returned to its regular run for further service. Negatively, it does not appear that the engine was constructed especially for any particular run or division, and it may therefore be assumed that it was physically capable of assignment to freight service on any division of the railroad and of being transferred or reassigned at any time from one run or division to another as the

exigencies of the railroad's business might require. It is admitted by one of the railroad's witnesses, Mr. Smith (printed record, p. 62), that the engine may have been used at times on a local run instead of the through run, such local run being, however, between the same terminals as mentioned above. It furthermore does not appear from the record what services the engine may have performed prior to having been assigned to the run from which it went into the repair shops. The District Court of Appeal below conceived that the character of service in which the locomotive had been engaged just prior to its entry into the repair shops was determinative. Solely from the facts stated above it deduced, as a conclusion of law, that the engine constituted an instrumentality wholly and permanently devoted to interstate commerce, and for that reason held the State Workmen's Compensation Act inapplicable.

It is our contention, as will be developed later in this brief, that the past or future character of service of the locomotive is wholly immaterial, the correct test being whether the locomotive was wholly withdrawn from service and not engaged in any kind of commerce at the time in question as distinguished from being interrupted in the course of an interstate haul, to go on at the conclusion of the repairs. (*Minneapolis and St. Louis R. R. Co. vs. Winters*, 242 U. S. 353.) If, however, some significance should be attached to the past or future service, it is still our contention that the undisputed

evidence in this case and the findings of fact of the trial tribunal do not permit the conclusion that this locomotive was an instrumentality permanently and wholly devoted to interstate commerce. An engine as such is not permanently devoted to any kind of commerce (*Winters case, supra*), and the particular engine, though on a wholly interstate run for a few months prior to its being sent to the repair shops, was, we may assume, capable of assignment to any freight run, at any time, interstate, intrastate, or mixed.

HISTORY OF THE LITIGATION.

The injury occurred, as stated, February 1, 1919. On July 3, 1919, Burton instituted proceedings before the California Industrial Accident Commission, claiming benefits under the state act against Walker D. Hines, as Director General of Railroads, United States Railroad Administration. Said Director General answered on July 11, 1919, claiming, *inter alia*, that the claim was governed by the federal act. Testimony was regularly taken and on December 19, 1919, said Industrial Accident Commission decided in favor of Burton, applying the state law. A petition for rehearing was denied by said Commission.

Under the California statutes, decisions of the Industrial Accident Commission may be reviewed only by writ of *certiorari*, denominated in said statutes a writ of review. Such proceedings must

be instituted before the District Courts of Appeal or the Supreme Court of the state, the latter being the highest court of the state. In such review proceedings said Commission is one of the respondents. The California Workmen's Compensation Act further provides that said Commission may appear by its own counsel in all proceedings in review of its decisions or affecting its jurisdiction. In the present matter such petition for *certiorari* was filed by the Director General on February 20, 1920, with the California District Court of Appeal, Second Appellate District, Division Two, and the writ was granted by the court on February 26, 1920. Thereafter the matter was briefed and submitted for decision upon the question of law mentioned above. While the case was before the District Court of Appeal, John Barton Payne, as agent under section 206, Federal Transportation Act, 1920, was substituted by stipulation of the parties and order of said court as petitioner in said *certiorari* proceedings instead of Walker D. Hines, Director General of Railroads, as the result of changes made by Congress in the railroad administration. A further substitution is in order at the time of writing this brief, by which James C. Davis, as agent under section 206, Transportation Act, should be substituted for John Barton Payne, and arrangements for such substitution are now being taken up independently of this brief.

On November 26, 1920, said District Court of Appeal entered its decision annulling the findings and award of the Industrial Accident Commission upon the ground that the case was within the federal act. A petition for rehearing was filed with said court by respondents below and denied on December 24, 1920. On January 3, 1921, respondents below filed a petition in the Supreme Court of the state for a hearing, which petition was denied by a vote of four to three of the members of the court on January 24, 1921, without opinion. Petition for *certiorari* was then filed in this court by said respondents below and granted by this court on March 14, 1921. This brief is now submitted as our opening brief upon the merits.

In case any question should arise in the minds of the members of this court as to the District Court of Appeal of California being the highest court in which decision could be had in this matter, we respectfully submit the following statement:

The District Court of Appeal of California is created by the state constitution and has original jurisdiction to issue a writ of *certiorari* or review. No appeal lies from said court to the Supreme Court of the state, but the Supreme Court may, in its discretion, order any matter pending before a District Court of Appeal to be transferred to it before decision, for a hearing and determination, and may also order such matter heard before the Supreme Court within thirty days after the decision

of the District Court of Appeal has become final. In the present case we applied to the Supreme Court of California for such hearing, as stated above, and our petition was denied without opinion. We have had at no time any other recourse to the Supreme Court of California than said petition for hearing, and such recourse has been exhausted. We have had no hearing before the Supreme Court of the state in this matter. The decision of the District Court of Appeal in the present case, therefore, constitutes a decision of the highest court of the state in which decision could be had (*Terry vs. Southern Pacific Co.*, 176 Cal. 584; 169 Pac. 354, dismissed in 249 U. S. 592).

STATEMENT OF PETITIONERS' CONTENTIONS.

We respectfully urge that the decision of the District Court of Appeal of the State of California was erroneous, and that the present case is not within the Federal Employers' Liability Act, for the following reasons:

1. The repairing of a locomotive wholly withdrawn from service for extensive shop repairs is not a service in interstate commerce within the federal act, for the reason that it neither facilitates interstate transportation of commodities nor is it so closely connected with interstate transportation as to be practically a part thereof. (*Pedersen vs. Del. L. and W. Ry. Co.*, 229 U. S. 146; *Shanks vs. Del L. and W. Ry. Co.*, 239 U. S. 556.)

2. This case is within the decisions of this court in *Minneapolis and St. L. R. Co. vs. Winters*, 242 U. S. 353; *B. and O. R. Co. vs. Branson*, 242 U. S. 623; reversing same title, 128 Md. 678; 98 Atl. 225; *Chicago, Kalamazoo and S. Ry. Co. vs. Kindlesparker*, 246 U. S. 657; reversing same title, 234 Fed. 1; and the decision of the Supreme Court of California in *Payne vs. Industrial Accident Commission*, — Cal. —, 192 Pac. 859; *certiorari* denied, 41 S. Ct. 218; and other cases cited, *infra*.

3. By reason of the extensive character of the alterations, overhauling, rebuilding, and installation of new equipment, the case is analagous to *Raymond vs. C. M. and St. P. R. Co.*, 243 U. S. 43; *New York Central R. Co. vs. White*, 243 U. S. 188; *Wright vs. Interurban R. R. Co.*, Iowa, 179 N. W. 877; *certiorari* denied, 41 S. Ct. 375; all relating to new construction of railroad equipment.

4. We urge this court to announce a clear-cut rule for determining jurisdiction in cases of injuries to railroad shop men working upon rolling stock withdrawn from service. Railroad shop men form a distinct group of railroad employees as to jurisdictional requirements, and should be considered as a unit with reference to their own necessities and conditions. Without such clear-cut rule, inferior courts can not, with assurance, determine which law to apply, and much hardship and unnecessary litigation results. We contend that the only practicable test of jurisdiction in repair shop cases is that

dependent upon whether the engine or car is withdrawn from service, as distinguished from being interrupted for repair during the course of an interstate haul, to go on after the repair. (*Minneapolis and St. Louis R. R. Co. vs. Winters*, 242 U. S. 353, *supra*.)

Any distinction based upon the character of use of the engine or car while in previous service, is incapable of practical application to repair shop cases, as all rolling stock is alike in the repair shop, and the nature of its previous service and subsequent assignment unknown to most or all of the repair shop employees.

ARGUMENT.

I.

THE SERVICE PERFORMED BY BURTON AT THE TIME OF HIS INJURY WAS NOT IN INTERSTATE COMMERCE OR TRANSPORTATION NOR WAS IT "WORK SO CLOSELY RELATED TO IT AS TO BE PRACTICALLY A PART OF IT," AND WAS NOT THEREFORE WITHIN THE FEDERAL ACT.

The jurisdictional requirements of the federal act is contained in the following excerpt:

"Every common carrier by railroad while engaged in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce* * * *." *Federal Employers' Liability Act of 1908*, approved April 22, 1908, 35 U. S. Stat. at L. 65, c. 149.

This provision has been interpreted by this court to require that the employee be engaged in service in interstate commerce *at the time of the injury*. (*Illinois Central R. R. Co. vs. Behrens*, 233 U. S. 473; *Erie R. R. Co. vs. Welsh*, 242 U. S. 303; *Southern Pacific Co. vs. Ind. Acc. Com. of the State of California et al.*, 251 U. S. 259.)

The general test of jurisdiction has been repeatedly stated by this court in about the same language in each decision. We quote the following statement

from *Erie R. R. Co. vs. Collins*, 253 U. S. 77, which is typical:

“In the *Pedersen* case it was said that the questions which naturally arise: ‘Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?’ or as said in *Shanks vs. Del. L. and W. Ry. Co.*, *supra*: Was the ‘work so closely related to it as to be practically a part of it?’”
Erie R. R. Co. vs. Collins, 253 U. S. 77.

Analyzing the foregoing test, cases under the federal act in one aspect naturally fall into two groups—(1) primary services, *i. e.*, services actually rendered in interstate transportation, such as the services of engineer, firemen, switchmen, etc., in moving interstate shipments; and (2) secondary services, *i. e.*, other services not directly moving interstate shipments, but nevertheless so closely related to such transportation as to be practically a part of it, such as the maintenance of instrumentalities then in use in interstate transportation, etc.

In another aspect, cases under the federal act may be classified according to the nature of the service:

(1) HAULING CASES, where the injury occurs in the course of the actual movement of interstate shipments by rail, such as injuries to members of train crews, switchmen, etc. (*Illinois Central R. R. Co. vs. Behrens*, 233 U. S. 473.)

(2) MAINTENANCE CASES, such as the upkeep and repair of articles at the time in use in assisting or supporting interstate movements, such as upkeep of tracks, bridges and roadbed (*Pedersen vs. Del. L. and W. Ry. Co.*, 229 U. S. 146), and the coaling, oiling, grooming of locomotives actually in use in interstate commerce and the making of repairs to such engines or cars interrupted in the course of an interstate haul, to go on. (*Minneapolis and St. L. R. Co. vs. Winters*, 242 U. S. 353, *supra*.)

(3) NEW CONSTRUCTION CASES, such as the building of new tracks, tunnels or structures not yet open for use in the movement of interstate commerce, though intended for such use when completed. (*Raymond vs. C. M. and St. P. R. Co.*, 243 U. S. 43; *New York Central R. Co. vs. White*, 243 U. S. 188.)

(4) REMOTENESS CASES, where the service is too far removed from the actual movement of interstate transportation to be practically a part of it, though nevertheless facilitating to a greater or lesser degree the carrying on of the interstate commerce business of the railroad. For instance, services with respect to commodities not yet received as an interstate shipment (*McClusky vs. Marysville and N. Ry. Co.*, 243 U. S. 36, or where the interstate movement has ended (*Lehigh Valley R. R. Co. vs. Barlow*, 244 U. S. 183), or where repair services are being rendered to rolling stock not at the time in active service (*Minneapolis and St. L. R. Co. vs.*

Winters, 242 U. S. 353; *B. and O. R. Co. vs. Branson*, 242 U. S. 623; reversing same title, 128 Md. 678; *Chicago, Kalamazoo and S. Ry. Co. vs. Kindlesparker*, 246 U. S. 657; reversing same title, 234 Fed. 1), or where services are rendered in connection with railroad supplies which have not yet reached a stage of active assistance in interstate transportation (*C. B. and Q. R. R. Co. vs. Harrington*, 241 U. S. 177; *Del. L. and W. R. R. Co. vs. Yurkonis*, 238 U. S. 439), or where the service is rendered to objects which in turn subsequently assist interstate commerce (*Shanks vs. Del. L. and W. R. R. Co.*, 239 U. S. 556; *Hines vs. Baechtel*, 113 Atl. 126; *certiorari* denied, 41 S. Ct. 537).

Let us inquire whether the service which petitioner Burton was rendering in the present case at the moment of his injury was either (1) a service in interstate transportation direct, or (2) a service so closely related to it as to be practically a part of it.

It is, we assume, a reasonable deduction from the decisions of this court that services rendered by an employee in interstate commerce, considering this term in its strict sense, are limited to services directly facilitating the transportation of commodities in an interstate shipment. The term "interstate commerce" would, therefore, strictly include only "hauling cases" as described above. All other services, if within the federal act, are so because of coming within the ancillary services which are "so

closely connected with it as to be practically a part of it.”

The term “interstate commerce” means primarily only the movement of articles of interstate commerce between the states. “Commerce” is the creation, transportation and sale of commodities which satisfy human wants. Railroads participate in commerce only to the extent of “transportation” of such commodities. It means, strictly, only *interstate transportation*.

The term “interstate transportation” has been repeatedly used by this court as practically synonymous with interstate commerce. (*Southern Pacific Co. vs. Ind. Acc. Com. of the State of California*, 251 U. S. 259; *Shanks vs. Del. L. and W. R. R. Co.*, 239 U. S. 556; *C. B. and Q. R. R. Co. vs. Harrington*, 241 U. S. 177.)

In the *Harrington* case, *supra*, this court said:

“As we have pointed out, the federal act speaks of interstate commerce in a practical sense suited to the occasion and ‘the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate *transportation*, or in work so closely related to it as to be part of it.’ *Shanks vs. Del. Lack. and West R. R.*, 239 U. S. 556, 558, and cases there cited. Manifestly, there is no such close or direct relation to interstate *transportation* in the taking of the coal to the coal chutes.” (*C. B. and Q. R. R. Co. vs. Harrington*, 241 U. S. 177.) (Italics ours.)

Clearly Burton's service in repairing a locomotive which was in the repair shops from December 19, 1918, to March 4, 1919, and was wholly out of service of all kinds during this period, was not to the slightest degree a service in interstate *transportation*. It did not move any shipments from one state to another.

Neither can it be said that such service was "so closely related to it (transportation) as to be a part of it." The term "it" as there used relates solely to interstate transportation, not, as often assumed, to the general activities of a railroad engaged in both commerces. Conceding that repairs to an engine in the course of an interstate haul, to go on with the haul upon the completion of the repairs, is a service so closely related to interstate transportation as to be a part of it, the repair of an engine which is wholly out of service and not engaged in any kind of commerce, would seem, it is equally clear, not to be a part of interstate transportation. (*Winters case, supra.*) It does not presently assist the interstate movement of articles of commerce.

The United States Circuit Court of Appeal of the Second Circuit has ably and clearly given expression to the view here contended for in the case of *Hudson and M. R. Co. vs. Iorio*, 239 Fed. 855, 856.

After commenting upon decisions of this court, that court states the test in the following language:

“For that (interstate commerce) was going on *without any present assistance*, either from Iorio or the rails upon which he was working, or the men who were working with him. We, therefore, hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working is the test of applicability of the statute under circumstances such as shown here.” (Italics ours.)

The *Iorio* case will be better understood by reference to its facts. Iorio at the time of his injury was assisting in gathering up for storage certain rails lying along the right of way and not a portion of the tracks at the time. Similarly, in the present case, the interstate transportation of the railroad was going on “without any present assistance” from Burton, or the engine upon which he was working, or the men who were working with him.

In the next division of this brief, authorities are cited in more detail, reinforcing this conclusion.

II.

THIS CASE IS WITHIN THE DECISIONS OF THIS COURT IN *MINNEAPOLIS AND ST. L. R. CO. VS. WINTERS*, 242 U. S. 353; *B. AND O. R. CO. VS. BRANSON*, 242 U. S. 623; *REVERSING SAME TITLE*, 128 MD. 678; 98 ATL. 225; *CHICAGO, KALAMAZOO AND S. RY. CO. VS. KINDLESPARKER*, 246 U. S. 657; *REVERSING SAME TITLE*, 234 FED. 1; *PAYNE VS. INDUSTRIAL ACCI-*

DENT COMMISSION, — CAL. —, 192 PAC. 859; CERTIORARI DENIED, 41 S. CT. 218; WRIGHT VS. INTERURBAN RY. CO., — IOWA —, 179 N. W. 877; CERTIORARI DENIED, 41 S. CT. 375; AND THE DECISIONS OF LOWER COURTS BASED THEREON IN LINDWAY VS. PENN. CO., — PENN. —, 112 ATL. 40; PAYNE VS. DE MOTT, — GEORGIA —, 106 S. E. 9; HERZOG VS. HINES, — N. J. —, 112 ATL. 315; CHICAGO, R. I. AND P. R. CO. VS. CRONIN, — OKLA. —, 176 PAC. 919; CHICAGO, R. I. AND P. R. CO. VS. INDUSTRIAL COMMISSION, 288 ILL. 126, 123 N. E. 278.

The foregoing cases, in our opinion, clearly establish the test of jurisdiction in repair cases to be whether the rolling stock, engine or car, is withdrawn from service at the time the repairs are made, as distinguished from being interrupted in the course of an interstate haul, to go on.

A brief review of these cases establishes this proposition:

In the *Winters* case (*Minneapolis and St. L. R. Co. vs. Winters*, 242 U. S. 353), the plaintiff was making repairs upon an engine used indiscriminately in interstate and intrastate commerce, which engine was used in interstate commerce the last trip before its repair and the first trip afterwards. This court said in part:

“*This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined*

especially to anything more definite than such business as it might be needed for. *It was not interrupted in an interstate haul to be repaired and go on.* It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment, it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events. Judgment affirmed.*" (Italics ours.)

In the *Branson* case (*B. and O. R. Co. vs. Branson*, 242 U. S. 623; reversing same title, 128 Md. 678, 98 Atl. 225), a painter was employed at a railroad roundhouse to paint engines and cars, which were necessarily out of service and commission while being painted. He contracted a metallic poisoning from the paints used, and filed suit for damages under the Federal Employers' Liability Act. The Supreme Court of Maryland, in 128 Md. 678, 98 Atl. 225, held the case to be within the federal act, in that the engines and cars, while in use, were employed in the interstate commerce business of the railroad. He was therefore, it was assumed as in the present case, keeping in usable condition instrumentalities of interstate commerce. This conclusion was reversed by this court in a memorandum opinion, upon the authority of *Del. L. and W. R. R. Co. vs. Yurkonis*, 238 U. S. 439;

C. B. and Q. R. R. Co. vs. Harrington, 241 U. S. 177; *Shanks vs. Del. L. and W. R. R. Co.*, 239 U. S. 556; and *Minneapolis and St. L. R. Co. vs. Winters*, 242 U. S. 353.

In the *Kindlesparker* case (*Chicago, Kalamazoo and S. Ry. Co. vs. Kindlesparker*, 246 U. S. 657; reversing same title, 234 Fed. 1), a repair man was injured while repairing an engine which, while in service, was used in hauling both interstate and local commerce. It is inferable from the statement below that this engine was seldom and perhaps never used in a train movement carrying exclusively local commerce, both commerces being always involved at the same time. The Circuit Court of Appeal of the Sixth Circuit held the case to be within the federal act, for the reason that the status of the engine, while in service, determined the status of the repair man employed upon it, and that under the decision of this court in the *Pedersen* case, *supra*, the repair must be considered as being made to a permanent instrumentality of interstate commerce. The fact that the locomotive was withdrawn from service for repair for an extended period was held immaterial, as it was not sufficient to show a permanent withdrawal from interstate service. That decision was reversed by this court in a memorandum opinion on the authority of the *Winters* case, *supra*. The reasoning employed by the court below was almost identical with that employed by the court below by the case at bar, both courts

trying to find a permanent devotion of the instrumentality to interstate commerce because of the character of service rendered while in use.

In the *Brizzolara* case (*Payne vs. Industrial Accident Commission*, — Cal. —, 192 Pac. 859; *certiorari* denied, 41 S. Ct. 218), a repair man was injured while repairing a switch engine withdrawn from commerce for a half day for such purpose. The Supreme Court of California, overruling its own prior decision upon the authority of the later decision of this court in the *Winters* and *Branson* cases, *supra*, held the case within the state law. This was in spite of the fact that the switch engine when in use was of considerable service in expediting interstate commerce by keeping the terminal freight yard open. This court, in denying petition for *certiorari*, approved the view taken below. The Supreme Court of California in the present case by a four to three vote refused to extend the doctrine there applied to the present case. This was done without opinion and we respectfully submit that there is no sound difference between the *Brizzolara* case and the present.

A case from the Supreme Court of Iowa, approved by this court, is in point to an exceptionally close degree. In *Wright vs. Interurban Ry. Co.*, — Iowa —, 179 N. W. 877; *certiorari* denied 41 S. Ct. 375, the case was presented of a repair man rebuilding an electric substation used by a railroad company engaged in both commerces. Prior to the repairing,

this substation was an integral part of the operating equipment of the company used in distributing electricity which furnished the motive power for the trains. Reconstruction of the building being desired, the company built a small portable shed for the electrical equipment and moved such equipment into the shed while the original substation was being repaired, it being understood that the substation was only out of use temporarily. The plaintiff was injured while working in the substation before the electrical equipment was returned to it. The court held the injury to be within the state law on the authority of *Shanks vs. Del. L. and W. Ry. Co.*, 239 U. S. 556; *Del. L. and W. Ry. Co. vs. Yurkonis*, 238 U. S. 439; *Minneapolis and St. L. R. Co. vs. Winters*, 242 U. S. 353; *Ill. Cent. R. R. Co. vs. Cousins*, 241 U. S. 641; and *Ill. Cent. R. R. Co. vs. Behrens*, 233 U. S. 473. The decision of this court in *Pedersen vs. Del. L. and W. R. Co.*, 229 U. S. 146, was held inapplicable. The fact that the room was being fitted out to be reoccupied for service in interstate commerce was held immaterial. This holding was sustained by this court by the denial of a petition for *certiorari*. There would seem to be no difference between an electric substation temporarily out of use, in view of the decision of this court in *Southern Pacific Co. vs. Ind. Acc. Com.*, 251 U. S. 259, holding that operation and repair of such electrical equipment while in use is a service in interstate commerce and a locomotive used in interstate com-

merce, also temporarily out of use for overhauling, as in the case at bar.

In *Payne vs. De Mott*, — Georgia —, 106 S. E. 9; *Chicago, R. I. and P. R. Co. vs. Cronin*, — Okla. —, 176 Pac. 919; and *Herzog vs. Hines*, — N. J. —, 112 Atl. 315; it is held directly and squarely that a man repairing an engine or car out of service at the time is not within the federal act. In the *Cronin* case, *supra*, the court well expressed its ruling as follows:

“We can not agree with the plaintiff in error that this broken-down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was ‘dead’; undergoing the repairs necessary to placing it in commerce.” (Italics ours.)

In *Lindway vs. Penn. Co.*, — Penn. —, 112 Atl. 40, the Supreme Court of Pennsylvania expressed the same view in more general language as follows:

“There seems to be a distinction made in the United States Supreme Court decisions between accidents happening to one while working on, or with, things which are in actual common use as instrumentalities of both interstate and intrastate commerce (see *Waina vs. Penn. Co.*, 251 Penn. 213, 96 Atl. 461; *Pedersen vs. Del L. and W. R. Co.*, 229 U. S. 146), and those occurring to persons while employed or working on things then being put in position for such common use

in the future (see *Harrington case, supra; Raymond vs. C. M. and St. P. R. Co.*, 243 U. S. 43; and *N. Y. Central R. R. Co. vs. White*, 243 U. S. 188, 192). * * * Where one, at the time of his injury, is employed on 'instruments' or 'facilities' which are, by him, then being 'kept in readiness for use' in both kinds of commerce (as in *Erie R. R. vs. Collins*, 253 U. S. 77, 85) as distinguished from being put in position for such use in the future, his case seems to fall within the interstate commerce class." (*Lindway vs. Penn. Co.*, — Penn. —, 112 Atl. 40.)

Cases in which this court has applied the federal act are in accord with this position.

The leading decision of this court on the application of the federal act is that of

Pedersen vs. Del. L. and W. R. Co., 229 U. S. 146,

in which the federal act was applied to the case of an employee injured while bringing a sack of bolts to a bridge under repair. The bridge was *in service* at the time in question. In *Kinzell vs. Chicago, Mil. and St. Paul Ry. Co.*, 250 U. S. 130, the federal act was applied to a case where the railroad was filling a trestlework bridge which spanned a dry gulf, with dirt, and the dirt had reached the level of the tops of the ties at the time of the injury. The decision was based upon the ground that the trestle was in use by interstate trains at the time, and failure to perform the service in question (keeping the track clear of earth and stones by means of a "dozer"

and “shovel”) would delay the passage of such trains. Similarly, other decisions of this court involving repairs to roadbed or equipment will be found, upon examination, to be based upon present use of such equipment in interstate commerce at the time of the repair.

**ANSWER TO ATTEMPTS BELOW TO DISTINGUISH THE
PRESENT CASE FROM THE FOREGOING AUTHOR-
ITIES.**

1. In the briefs and decision below in the present case, one attempted ground of distinction between the present case and the principal cases cited above, was that the engine in the present case was claimed to have been permanently and exclusively devoted to interstate commerce while in service, while in the three principal cases cited above the engine was used for moving both interstate and intrastate commerce while in service. In the next main division of this brief we will show that the engine in the present case was not wholly employed in interstate commerce while in service. As to its legal effect, we here reiterate our claim that the past service of the engine, even if engaged exclusively in interstate commerce, is immaterial.

“An engine as such is not permanently devoted to any kind of traffic * * * ” (*Minneapolis and St. L. R. Co. vs. Winters*, 242 U. S. 353). With the possible exception of an engine which is so constructed that it is incapable of being used in local commerce, which, if it can exist, is not claimed to have been

the case here, any engine is capable of assignment or transfer from one kind of service to another, as the business of the railroad may require. A *permanent* assignment to interstate commerce alone is legally, and, as a matter of fact, impossible.

Also, it is well established by the decisions of this court that an engine hauling a train in which there is one interstate car, is just as much engaged in interstate commerce as if every car in the train was interstate. The fact that the train may have been exclusively interstate therefore adds nothing to the character of the engine.

Confusion has arisen upon this matter of "permanent and exclusive devotion to interstate commerce," because of a misunderstanding by inferior courts of the decision of this court in the *Pedersen* case (*Pedersen vs. Del. L. and W. R. Co.*, 229 U. S. 146). In that case, the first case involving repairs to bridges and roadbed to reach this court, reference was made in general terms, to repairs to *instrumentalities permanently devoted to interstate commerce* coming within the federal act. The court was here speaking of repairs to a railroad bridge, a portion of the immovable equipment of a railroad, similar in character to roadbed, tracks, etc. This decision was erroneously construed by inferior courts, including the Supreme Court of California in *Southern Pacific Co. vs. Pillsbury et al.*, 170 Cal. 782, 151 Pac. 277; *certiorari* denied, 244 U. S. 653;

to include repairs to engines. This misconception was cleared up by this court in the *Winters* and *Branson* cases, *supra*, by which it is definitely held that engines (movable equipment), even though used in the interstate business of the railroad, are not permanent instrumentalities of interstate commerce while out of service for repairs. "This is not like the matter of repairs upon a road permanently devoted to commerce among the states." (*Winters* case, *supra*.) The Supreme Court of California has construed the *Winters* and *Branson* cases as overruling its decision in the case immediately above referred to, in *Payne vs. Industrial Accident Commission*, — Cal. —, 192 Pac. 859, *certiorari* denied, 41 S. Ct. 218. Hence, the mere fact that the past assignment of an engine may have been wholly or nearly wholly to interstate commerce, is immaterial. The engine is still a portion of the movable equipment of the railroad, susceptible of use in either kind of business, local or interstate, and of transfer from one such use to another, as the business of the railroad may require.

In addition, the following distinctions between immovable equipment (roadbed, tracks, bridges, etc.) and movable equipment (rolling stock) appear:

(a) Tracks, bridges, etc., are not ordinarily out of service during repairs, but are an existing and permanent instrumentality of interstate commerce at all times, whether under repairs or not (at least every decision in which the jurisdictional question

is discussed, is one in which the instrumentality remained in service during the repairs). An engine or car, on the other hand, is taken out of commission and service when undergoing extensive repairs, and is then even more out of service in interstate commerce than while carrying local commerce solely, in which latter case it is not within the federal act, *Illinois Central R. Co. vs. Behrens*, 233 U. S. 473. The dedication of a track to interstate commerce is, therefore, permanent, but that of rolling stock intermittent or occasional only, lasting while the instrumentality is actually in use in interstate commerce.

In *Foley vs. Hines*, 119 Mo. 425, 111 Atl. 715, 717; *certiorari* denied, 41 S. Ct. 450, it is pointed out by the Supreme Court of the United States that repairs to roadbed and bridges are to be classed as repairs to permanent instrumentalities of interstate commerce because they are in the nature of fixtures, thereby differentiating them from rolling stock.

(b) It is physically impossible to segregate portions of the track of an interstate carrier into interstate and local parts either temporarily or geographically. Interstate, mixed, and local trains move over the whole track every day, and no particular stretch of track can be said to be solely in one kind of commerce at one time, or solely in another kind of commerce at another time. All engines, on the other hand, are capable of and do propel interstate commerce solely at some times, intrastate solely at others, and mixed trains at

others. This court has recognized such different character at different times of trains, crews and cars for the purposes of jurisdiction, depending upon the kind of commerce being transported at the moment, *Illinois Central R. Co. vs. Behrens, supra*.

2. A second suggested differentiation is that the engine in this case crossed the state line daily on its run from one end of the railroad division to the other. This fact was not referred to by the lower court in its opinion, and is, in our opinion, legally immaterial. The test of jurisdiction, as to a train, is the character of the commodities of commerce carried by it, not the physical movement of the train itself. *Commerce* consists in the movement of *commodities*. An engine or a train need not cross a state line to be engaged in interstate commerce, the presence of passengers or commodities on the train en route to points in another state being sufficient. An engine running without cars at the time it crosses the state line, on the other hand, would not usually be engaged in interstate commerce, because not engaged in any kind of commerce.

For instance, the Knickerbocker Express runs daily from Chicago to New York. It is no less an instrumentality of interstate commerce when crossing from one side of Indiana to the other, than while crossing from Indiana to Ohio. It retains its same character throughout. And an express train running from New York City to Albany, wholly within the State of New York, is almost always an

instrumentality of interstate commerce, because almost always it will carry one or more passengers traveling on interstate tickets, or one or more pieces of baggage, express or mail, which are being carried in the course of an interstate movement.

3. The court below relied mainly, in support of the decision here complained of, upon cases which have been overruled by implication by this court.

The court below cited as the main authorities for its decision, the cases of *Law vs. Illinois Central R. Co.*, 208 Fed. 869, and *Northern Pacific Ry. Co. vs. Maerkl*, 198 Fed. 1. These are the only cases which involve repairs to rolling stock, and hence the only cases in point upon their facts, to the present case. Both the cases cited were decided by the inferior courts prior to the decision of this court in the *Winters* and *Branson* cases, *supra*. They are inconsistent with and overruled by the latter cases, and not authority, leaving the decision below in the present case without the support of any authority closely in point upon the facts.

4. It was further urged below that the locomotive in the present case was an instrumentality permanently devoted to interstate commerce because of the character of its use for some months preceding its entry into the repair shops. We have presented above our contention that an engine can not be considered as permanently devoted to any kind of commerce. If the court should not fully coincide with this position we here desire to urge the conten-

tion that upon the present record the engine was not in fact wholly used in interstate commerce prior to its injury. As the District Court of Appeal agreed with the Industrial Accident Commission that the facts were not controverted in the case, and as it clearly appeared that there were no conflicts in the evidence, it follows that the determination of the District Court of Appeal regarding the legal character of the engine is a conclusion of law rather than of fact, and hence now subject to review.

Miedrich vs. Lauenstein, 232 U. S. 236;

Southern Pac. Co. vs. Schuyler, 227 U. S. 601, 611;

Creswill vs. Grand Lodge, etc., 225 U. S. 246, 261;

Kansas City Southern Ry. Co. vs. Albers Com. Co., 223 U. S. 573.

The record shows that the engine in question, while in service, was regularly assigned to, and used upon the through freight service of a railroad division, of which the eastern terminal was in the state of Nevada and the western terminal in the State of California. It regularly hauled through freight trains from one end to the other of this division. There was also a local freight train run upon the same division, which, while going west, picked up cars at way stations which were bound to points beyond the division, and hauled them to the end of the division, at which point they were put into the next through freight train. Necessarily,

such local freight on its west bound trip would pick up cars at way stations in California which were consigned to destinations in California, and hence were in intrastate service. And in going east, it would pick up freight in Nevada consigned to points in Nevada. The engine upon which Burton was injured may have been used at times on this local service (printed record, p. 62). Furthermore, this engine on February 25, 1919, when released from the shops temporarily, hauled freight from Los Angeles, California, to San Pedro, California, containing both interstate and intrastate cars, and on the next day made a return trip between the same points, similarly hauling both kinds of commerce. When finally released from the shops on March 4, the engine started east from Los Angeles with a through freight. The record fails to show whether said train consisted solely of interstate cars or included local cars bound for points outside the first division. The engine was therefore used more or less in mixed interstate and intrastate service, instead of in exclusive interstate service.

The court does not squarely state as a fact that the engine was used wholly and solely in interstate commerce throughout. It states merely that "this locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce * * *." This is substantially correct, and yet upon the facts stated above, does not warrant the conclusion that the

engine was permanently and exclusively devoted to interstate commerce, if such a thing be possible. Reference to "several months" means an exclusive use for a short period only, which is not a permanent dedication. And in the last paragraph of its opinion, the court states merely, "here the engine was permanently devoted to interstate commerce * * *." This is an erroneous conclusion of law, not a recital of the facts, and therefore subject to reversal by this court.

III.

THE PRESENT CASE IS ANALOGOUS TO THAT OF NEW CONSTRUCTION OF TRACK OR ROLLING STOCK, HELD IN *RAYMOND VS. C. M. AND ST. P. R. CO.*, 243 U. S. 43, TO BE GOVERNED BY STATE LAW.

The locomotive in the present case was in the repair shops for several months for extensive overhauling and repairs, as well as for installation of new equipment. It was dismantled while in the shop. The new equipment to be added consisted of a superheating apparatus to increase steam pressure and in other miscellaneous additions.

It has been held by this court that the original construction of a tunnel or roadbed is not governed by the federal act. The object does not become an instrumentality of interstate commerce until *put into use in carrying commerce*. *Raymond vs. C. M. and St. P. R. Co.*, 243 U. S. 43. The same is necessarily true of new construction of engines and cars.

By analogy the same rule should apply here. While dismantled the engine was of no greater service to interstate commerce than if it were being newly built. As to its rebuilding and being fitted with new equipment, it falls within the principle of the *Raymond* case.

IV.

WE URGE THIS COURT TO ANNOUNCE A CLEAR-CUT RULE FOR DETERMINING JURISDICTION IN CASES OF INJURIES TO RAILROAD SHOPMEN WORKING UPON ROLLING STOCK WITHDRAWN FROM SERVICE. RAILROAD SHOPMEN FORM A DISTINCT GROUP OF RAILROAD EMPLOYEES AS TO JURISDICTIONAL REQUIREMENTS, AND SHOULD BE CONSIDERED, TO SOME EXTENT, WITH REFERENCE TO THEIR OWN NECESSITIES AND POSITION. WITHOUT SUCH CLEAR-CUT RULE, INFERIOR COURTS CAN NOT, WITH ASSURANCE, DETERMINE WHICH LAW TO APPLY IN LITIGATED CASES, AND MUCH HARDSHIP AND UNNECESSARY LITIGATION RESULTS. WE CONTEND THAT THE ONLY PRACTICABLE TEST IN REPAIR SHOP CASES IS THAT DEPENDENT UPON WHETHER THE ENGINE OR CAR IS WITHDRAWN FROM SERVICE, AS DISTINGUISHED FROM BEING MERELY INTERRUPTED FOR REPAIR DURING THE COURSE OF AN INTERSTATE HAUL, TO GO ON AFTER THE REPAIR. ANY DISTINCTION BASED UPON THE CHARACTER OF USE OF THE ENGINE OR CAR WHILE IN USE IS CONTRARY TO THE PURPOSE OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND INCAPABLE OF PRACTICAL APPLICATION TO INJURIES SUSTAINED BY REPAIR SHOPMEN, TO WHOM ALL

ROLLING STOCK IN THE REPAIR SHOP IS ALIKE, AND TO WHOM ITS PAST SERVICE AND FUTURE ASSIGNMENT IS UNKNOWN.

In our brief to this court in the *Brizzolara* case, *supra*, we urged the necessity for the adoption of a workable rule in the following language:

“We urge upon the court the necessity of a workable rule, in repair cases, to determine whether cases fall within the federal or state act. Litigants should be able to determine, with some certainty, under which law to sue. Inferior tribunals should have a definite and authoritative test by which to determine this question. Men are being hurt constantly in railroad repair shops. There is much confusion as to their rights.

“As a practicable matter, any test of jurisdiction in repair cases should, therefore, be workable, *i. e.*, one which counsel and inferior courts can apply with assurance, and which will tend towards the elimination of appeals on the jurisdictional question and possible loss of rights by bringing suits in the wrong forum.

“We respectfully submit that the test we here contend for, and which we understand the *Winters* and *Branson* cases to adopt, is workable, susceptible of application without controversies and appeals, and is sound upon principle. This test is that all repairs upon rolling stock, while withdrawn from service, fall under state laws. We further respectfully submit that the proposed bases of differentiation (respecting degrees

of service in interstate commerce in past serving) submitted by petitioner between the *Winters* and *Branson* cases and the present, are unworkable, and would increase rather than diminish the difficulties of inferior tribunals and litigants in determining jurisdiction in repair cases.”

It is an absurdity to require a workman in a repair shop to know or to ascertain at his peril, the past history and character of service of every engine or car which enters the shop for repairs. An engine does not bear stamped upon it a history of the nature and character of its past service. Neither can it be determined from an inspection of the engine to what division and service it is to be assigned upon leaving the repair shop. This information is in the possession of the railroad and inaccessible to shop employees contemplating bringing suits against the railroad company.

Looking at the physical situation of shop employees, no principle of logic, expediency, or public policy justifies a change in the *lex* with each engine or car which comes into the shop. In the repair shop all engines and cars stand alike.

As a practical matter, the repair of one engine or car, while withdrawn from service, is no more closely related to the immediate movement of commerce, interstate or local, than the repair of any other engine or car. All repair shop men should be treated alike for the purposes of jurisdiction.

CONCLUSIONS.

For the foregoing reasons petitioners respectfully request this court to reverse the judgment of the District Court of Appeal of the State of California, Second District, Division Two, in this proceeding, and to remand this proceeding to said court with directions to apply the Workmen's Compensation, Insurance and Safety Act of 1917 of the State of California to the claim asserted by petitioner Burton instead of the Federal Employers' Liability Act.

Respectfully submitted.

WARREN H. PILLSBURY,
Counsel for Petitioners.

Copy

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IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1921.

No. 224.

Industrial Accident Commission of the
State of California and O. J. Burton,
Petitioners,

vs.

John Barton Payne, as Agent Under
Section 206, Transportation Act,
1920 (Los Angeles & Salt Lake
Railroad Company),
Respondent.

Brief in Answer to Petitioners' Brief on Certiorari.

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IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1921.

Industrial Accident Commission of the
State of California and O. J. Burton,
Petitioners,

vs.

John Barton Payne, as Agent Under
Section 206, Transportation Act,
1920 (Los Angeles & Salt Lake
Railroad Company),

Respondent.

Brief in Answer to Petitioners' Brief on Certiorari.

The Question for Decision.

As stated by petitioners, there is but one question in this case for decision, namely, whether O. J. Burton's claim upon account of personal injuries, sustained by him while working in the locomotive shop of the Los Angeles & Salt Lake

Railroad Company at Los Angeles, California, during the period of Federal Control of Railroads, is governed by the provisions of the Federal Employers' Liability Act (Act. of April 22, 1908, c. 149, 35 Stats. at L. 65, subsequently amended in respects not here material), or by the provisions of the Workmen's Compensation, Safety and Insurance Act of California (California Statutes 1917, Chap. 586).

More concretely stated, however, the question is: O. J. Burton, an employee of the United States Railroad Administration, having been injured while engaged in repairing a locomotive in the locomotive shop of the Los Angeles & Salt Lake Railroad Company at Los Angeles, California, during the period of Federal Control of Railroads, which locomotive had been used for several months exclusively in interstate commerce (exclusively, in the sense that in each and every trip it hauled, either wholly or in part, shipments moving in interstate commerce), and which had been placed in the shop for general overhauling, whereupon it was the intention to return it to its same regular service, and which was in fact so returned, was he at the time of receipt of his injury engaged in work so intimately connected with interstate commerce as practically to be a part of it (in which case the Federal Employers' Liability Act would

govern his rights) or not (in which latter case the Workmen's Compensation Safety and Insurance Act of California would govern)? If the former, then the decision of the state courts of California should be affirmed; if the latter, a reversal should be ordered.

THE FACTS.

As has been stated many times by this court and other courts in passing upon similar cases, each case is to be decided upon its particular facts.

Petitioners' statement of facts in this case is substantially correct. However, in order that there may be no misunderstanding, the following additional facts are called to the attention of the court.

While the locomotive in question, No. 3673, was placed in the shop on December 19th, 1918, and the repairs thereon were not in fact completed until February 25th, 1919, it had been the expectation to complete the work on about January 30th, the delay in completion of the work being due to delay in the delivery of certain necessary materials.

The locomotive was not, according to the record, completely stripped and dismantled although the pipes, jacket and other removable objects had been taken off, including also the

wheels and a portion of the fire-box which was being repaired. The repairs were what are known as class C-3, according to government classification, and comprise a general overhauling, and repairs to flues, and the application of super-heater equipment. [Printed Record, p. 59.]

Petitioners refer on page 3 of their brief to the fact that on March 4, 1919, the locomotive was used on "two short intrastate runs" to be tried out, and that it was thereafter returned to its regular run for further service. It may be material here to point out, in order that there may be no misunderstanding, that even in the breaking-in process the locomotive on all such trips hauled shipments moving in interstate commerce (except, however, certain movements in the yards at Los Angeles, California, without cars attached, before it was deemed advisable to send it out on the line for breaking-in purposes, with cars attached). The District Court of Appeal in its opinion state with reference to these movements:

"After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25th, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar

train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of 'breaking in' after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4th, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used."

Petitioners on page 3 of their brief state that it does not appear that the engine was constructed especially for any particular run or division, and that it may, therefore, be assumed that it was physically capable of assignment to freight service on any division of the railroad or of being transferred or re-assigned from one run or division to another. This indeed might be said of any engine or car upon the line of railroad of the Los Angeles & Salt Lake Railroad Company, or of any other railroad, but that is in no way helpful in the decision of this case. No matter how short the run and no matter how far removed from state lines may be the line or division over which it operates, the locomotive is still an instrumentality of interstate commerce if in its service it hauls shipments moving from one state to another. (Philadelphia & Reading Railroad Company v. Han-

cock, United States Supreme Court, 40 Supreme Court Recorder 512; Koons v. Philadelphia & Reading Railroad Company (Penn.), 114 Atlantic 262.)

Reference is made at the top of page 4 of petitioners' brief to a "local run" which, however, was between terminals, one of which was in the state of Nevada, the other in the state of California. The movements, therefore, were clearly interstate.

The conclusions of the District Court of Appeal as expressed in its opinion were, therefore, correct when it states that the engine had been used for several months "exclusively" in interstate commerce, to which service after its repairs it was the intention to return it, which intention was actually carried out. In its every movement (except in the yards at Los Angeles where it was moved without cars attached, as a preliminary breaking-in), it hauled shipments moving in interstate commerce and, therefore, it was engaged exclusively in interstate commerce when in service within the meaning of the Federal Employers' Liability Act.

For the convenience of the court there is attached hereto next following this brief a complete copy of the opinion of the District Court of Appeal of the state of California, Second Appellate District, Division Two, to review

which this proceeding is brought. It contains a succinct statement of the facts. Respondent respectfully requests that this court refer thereto as it is confidently submitted that the conclusions there reached and the law as there applied, are correct and sound.

The Facts of This Case and the Law Applicable Thereto Have Been Fully Considered Both by the District Court of Appeal of the State of California and by the Supreme Court of That State.

Upon a writ of *certiorari*, which is the method provided by law in this state for the review of awards of the Industrial Accident Commission, the District Court of Appeal, Second Appellate District, Division Two, reviewed the award originally made by that commission in favor of O. J. Burton, one of the present petitioners, and on November 26, 1920, rendered its decision and by its order annulled the award theretofore made in favor of O. J. Burton.

On October 4, 1920, the Supreme Court of this state rendered its decision in the so-called Brizzolara case (*Payne v. Industrial Accident Commission of the State of California*, Cal., 60 Cal. Dec. 365, 192 Pac. 859, in which a petition for writ of *certiorari* was denied by this court on January 17th of last year, 41 Supreme Court Reporter 218), and on No-

vember 1st, 1920, that court denied a petition for rehearing. At the time of the decision of the District Court of Appeal in the instant case, namely, November 26, 1920, it had before it the opinion of the state Supreme Court in the Brizzolara case, and the District Court of Appeal in its opinion in this case took occasion to review the Brizzolara case, and, as will be more in detail later on in this brief referred to, clearly distinguished its facts from those of the case presently under consideration.

Full briefs were filed with the District Court of Appeal prior to its original decision; thereafter the present petitioners made application for a rehearing by that court, and upon that application briefs were again filed by the respective parties. That application for rehearing was denied by the District Court of Appeal on December 24, 1920.

Thereafter the present petitioners filed an application for hearing of the case by the Supreme Court of this state. Again briefs were filed by the respective parties. On January 24, 1921, the Supreme Court of the state of California denied the petition for hearing in that court. In the meantime, and on January 17, 1921, the Supreme Court of the United States denied the petition for a writ of *certiorari* in the so-called Brizzolara case.

It is at once apparent that this case has had the fullest and most careful consideration, both by the District Court of Appeal and by the Supreme Court of this state, presented by the parties as it has been upon numerous briefs. Those courts each had before them, in passing upon the facts of the present case and the law applicable thereto, the recent Brizzolara case, and by the original decision and opinion herein rendered, and the denial of the petition for rehearing, and the denial of the petition for hearing in the Supreme Court of the state, clearly marked out and established the line of distinction between the two cases upon their respective facts. Likewise, with respect to other cases relied upon by petitioners.

Statement of Respondent's Contentions.

Respondent will in general follow the outline of argument used by petitioners in their brief. The argument, therefore, is divided into four main subdivisions which may be stated as follows:

1. At the time he received his injury, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore the Industrial Accident Commission of California has no jurisdiction in this case.

2. The facts of this case are entirely distinguishable from those in the cases of *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353; *B. & O. R. R. Co. v. Branson*, 242 U. S. 623, and other cases upon which petitioners rely.

3. The facts of this case are not analogous to those of cases involving new construction.

4. Notwithstanding whatever desirability there may be for an easily applicable rule for the determination of jurisdictional questions in cases involving injuries sustained by railroad shopmen, this is not the determinative consideration because jurisdictional questions turn upon an application of the law relating to matters of jurisdiction to the facts of each particular case. Congress itself has never seen fit to attempt a definition of the field, nor could it in any event override constitutional provisions. The question is in each case, after the facts are determined, a purely judicial one. It would be clearly without authority in law to allow matters of mere convenience to vary one way or another the line of demarcation between those cases falling within the provisions of the Federal Act, and those not.

ARGUMENT.

I.

At the Time He Received His Injury, Burton Was Engaged in Work so Intimately Connected With Interstate Commerce as Practically to Be a Part of It, and Therefore the Industrial Accident Commission of California Has No Jurisdiction in This Case.

In order that an injured person be permitted to recover under the provisions of the Federal Employers' Liability Act, it must first appear, as one of the jurisdictional requirements, that at the time of the injury the injured person was engaged in interstate commerce or in work so closely related thereto as to be practically a part of it. (Illinois Central Railroad Company v. Behrens, 233 U. S. 473; Erie Railroad Company v. Welsh, 242 U. S. 303; Southern Pacific Company v. Industrial Accident Commission of California, 251 U. S. 259; Erie Railroad Company v. Collins, 253 U. S. 77; Shanks v. D. L. & W. Railway Company, 239 U. S. 556.)

As stated by petitioners the cases relating to the Federal Employers' Liability Act may be divided into two classes, the first involving services rendered directly in interstate transportation, and secondly, services not directly in the movement of interstate shipments, but neverthe-

less so closely and intimately related thereto as practically to be a part thereof.

There is no contention upon the part of the respondent that the services rendered by Burton were directly in the movement of interstate shipments, but respondent does earnestly and confidently contend, as stated by the District Court of Appeal in its opinion in this case, that Burton at the time he was injured

“was engaged in work so intimately connected with interstate commerce as practically to be a part of it and, therefore, that the Industrial Accident Commission of California has no jurisdiction.”

The operation of a line of railroad necessitates the use of several classes of facilities. One of these consists of right of way, roadbed, tracks, bridges, etc.; another, locomotives, engines and cars to be run over those tracks; another, maintenance and repair shops and other equipment necessary to keep such rolling stock in a condition that the same may serve economically and well. Each of these classes, and the several other classes into which the properties of a railroad company may be divided, serve a certain definite purpose. Engines and cars wear by continued use and constantly require maintenance and repair work thereon.

Engines and cars are as necessary for the operation of a line of railroad as are the tracks

and bridges over which they operate. As stated in the case of *Pedersen v. D. L. & W. Railroad Company*, 229 U. S. 146:

*"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reason unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment' used in interstate commerce. But independently of the statute, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it." (The italics are ours.)*

Had the same locomotive never been used in the movement of interstate shipments, but, on the contrary, had it always been an instrumentality only of intrastate commerce (both before and after its repairs in the shop were made), or if it appeared that at times the locomotive was used solely in intrastate work, at times solely in interstate work, and at other

times in mixed interstate and intrastate work, as in the Brizzolara case (Payne v. Industrial Accident Commission, 60 C. D. 365, 192 Pac. 859; *certiorari* denied, 41 Supreme Court Reporter 218), then under the rule of that case, and the Winters case, hereafter more at length referred to, Burton's rights would have fallen within the provisions of the California State Workmen's Compensation Act. The same repairs might have been required, and Burton might have been called upon to do the same work, in either case. It is apparent that the nature of the work the man himself was doing at the time of the injury is not to be taken as the sole test whether the federal act or the state act is applicable. First it must be determined whether the instrumentality upon which he was working was one of interstate commerce; and therefore, the nature of its service, both before and after the injury, and the intent while repairs were being made, as to its future use, become vital.

As pointed out in the case of Shanks v. D. L. & W. Railroad Company, 239 U. S. 556, 558:

"The federal act speaks of interstate commerce in a practical sense suited to the occasion."

Under any practical view, therefore, we submit that Burton at the time he was injured was

engaged in work so intimately connected with interstate commerce as practically to be a part of it, for the reason that the repairs to this very instrumentality which has been used in interstate commerce exclusively, were necessary in order that it be returned to that very same class of service over a division, one terminal of which is in California, the other in Nevada, and in accordance with the actual intention so to do, which was carried out. As stated by the District Court of Appeal in its opinion,

“So far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.”

After an analysis of the cases in subsequent subdivisions of this brief, this subject will be more fully developed.

II.

The Facts of This Case Are Entirely Distinguishable From Those in the Cases of Minn. & St. Louis Railroad Company v. Winters, 242 U. S. 353; B. & O. Railroad Company v. Branson, 242 U. S. 623, and Other Cases Upon Which Petitioners Rely.

Considering first the case of Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, we quote a portion of that opinion, ourselves

italicizing some of the language there used by the court:

"The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was again on October 21, after the accident, to pull a freight train out from the same place. *That is all we have, and is not sufficient to bring the case under the act.* This is not like a matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, *and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for.* It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen.* At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, *not upon remote probabilities or upon accidental later events.*"

In that case the facts appeared merely by stipulation that the engine "had been used in

the handling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was again, on October 21, after the accident, used to pull a freight train out of the same place. The stipulation simply failed to show such a character of user as to bring the case within the federal act.

This court in its opinion observed, "it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for." In the case now before this court for consideration, the engine prior to its being brought into the shops for repairs had been used exclusively in interstate commerce; it was being repaired in order that it might continue in this line of work, and while in the shop was destined to return to the same, and after the repairs were completed it actually did resume its work exclusively in interstate commerce.

Further, in the opinion in the Winters case, this court stated: "Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen." But in the instant case

it clearly and affirmatively appears from the evidence that its next work should be interstate, being assigned as it was to a desert division, one terminus of which is in California, the other in Nevada (which fact of itself is of only incidental importance so long as shipments interstate were being moved), and it was in fact actually returned to that exclusive character of service. Likewise its work did not depend "upon remote probabilities or upon accidental later events." "Its continued use in interstate traffic was as certain as anything in human affairs can be predetermined."

Petitioners assert, in their attempt to bring the facts of the present case within the rule of the Winters case, that an irrevocable dedication of an engine to a particular kind of traffic cannot be and is not made, and that it is not shown that this engine was of such a type of construction that it could be usable only in interstate commerce. This, even if true, obviously does not in any way affect the correctness of the decision rendered by the state courts. Indeed, a roadbed is not of such a type of construction that it is usable only in interstate commerce, as opposed to intrastate traffic, nor in fact, can this statement be applied to any instrumentality of a railroad company. The test is based upon the character of the usage to which assigned and de-

voted, and the fact remains in the instant case that the engine in question prior to the injury, was used exclusively in interstate traffic; that it was shopped in order that it be kept in condition economically and well to continue its handling of such traffic to which, while in the shop it was assigned, and that after the shop work was completed, it was actually restored to its service exclusively in interstate commerce (exclusively, in the sense that in all its movements it handled shipments moving interstate, and hence, exclusively, within the provisions of the Federal Employers' Liability Act and decisions interpreting the same).

In *Rausch v. B. & O. R. R. Co.*, 243 Fed. 712, the court there said, referring to the *Winters* case:

"If * * * the engine (in the *Winters* case) had been permanently devoted to interstate commerce, a different result would follow from the reasoning of Mr. Justice Holmes."

The New York courts have recognized this distinction in the case of *Palermo v. Erie R. R. Co.*, 173 N. Y. Supp. 456, involving an injury to an employee who was engaged in placing on a storage track a locomotive which had come in from an interstate run and which the evidence disclosed had been used on that interstate run

for a considerable period of time. In discussing this matter the court said:

"I think that if the locomotive in question was regularly devoted to the work of drawing the Tuxedo express from Newburgh to Jersey City and back to Newburgh, and so in interstate commerce, that everything that was done incidental to this use of the locomotive was also directly related to interstate commerce. * * * On the other hand, if this locomotive was not in the regular course of business assigned to this run and its use next day undetermined when it was laid up for the night, then the doctrine of the Winters case, *supra*, would govern."

The same distinction was noted in *Central R. R. Co. v. Sharkey*, 259 Fed. 144, and in *Atlantic Coast Line v. Woods*, 252 Fed. 428. In the latter case the court said:

"The case at bar, as we have stated, is distinguishable from the cases relied on by counsel for plaintiff (Winters case), *inasmuch as the engine was taken out of interstate commerce for the express purpose that it might be repaired to enable it to continue as an instrument of commerce.*" (The italics are ours.)

Had this court intended to enunciate the rule for which the petitioners here contend, that no locomotive withdrawn from service for repairs could be held an instrumentality of interstate commerce while so withdrawn, it would no doubt

in deciding the Winters case have so stated. But by its very language there used, it showed that under other states of fact (no facts there appearing other than the brief stipulation), the result might be different.

In its opinion in the Winters case, this court stated:

“Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen.”

There was no such indefiniteness in the case at bar.

The District Court of Appeal in its opinion clearly distinguishes the present case from the Winters case in the following language:

“The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote probabilities or accidental later events.”

And, further, with reference to the Brizzolara case:

“The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service upon completion of the necessary repairs, and was so returned when placed in condition for such use.”

In the case of *B. & O. R. R. Co. v. Branson*, 242 U. S. 623, 61 Law Edition 534, same case below, 128 Md. 678, 98 Atl. 225, which will hereafter be referred to as the Branson case, it appeared that a painter who was employed in a railroad shop to paint cars and engines, contracted a metallic poisoning from the paints, and filed suit under the Federal Employers' Liability Act charging negligence. This court in a memorandum decision under the authority of *D. L. & W. R. R. Co. v. Yurkonis*, 238 U. S. 439; *C. B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177; *Shanks v. D. L. & W. R. R. Co.*, 239 U. S. 556, and *M. & St. L. R. R. Co. v. Winters*, 242 U. S. 353, held that the plaintiff in the original action before the state court was not at the time of receipt of his injury engaged in interstate work so as to entitle him to the benefits of the Federal Act. The Branson case must be considered only at most, a companion of the Winters case. But in the Branson case it cannot even be determined whether the employee was when injured working on engines or cars; it cannot be determined from whence they had come or whither they were going; it cannot be determined what character of work they had been engaged in before they were painted, nor what character of work they were destined to perform after the painting was completed.

Very probably the contraction of the poisoning was more or less gradual. The Branson case, therefore, adds nothing to the doctrine of the Winters case; in fact, the evidence in the former lacked in several respects the definiteness of that of the latter. In the Winters case there was no question as to the identity of the engine which was being worked upon at the time of the injury, while in the Branson case there was no showing as to what engines or cars the injured party was working upon when he contracted the poisoning, nor, indeed, was such a showing possible. In the Winters case the stipulation afforded some information as to the use made of the instrumentality in question, both before and after the injury. This information was of course, under the circumstances, totally lacking in the Branson case.

In the Brizzolara case, which has been referred to above, the opinion in which case was before the District Court of Appeal at the time it rendered its decision in the instant case and in respect to which the petition for writ of *certiorari* had been denied by this court at the time the Supreme Court of the state of California denied a hearing of this case, it appeared that the switch engine involved in the Brizzolara case was used in the movement of both interstate and intrastate traffic, being at

one time engaged in one service, at another time in the other, and at still other times, in both. It does not there appear that it was intended for any particular service for the future, either interstate or intrastate, or that it was in fact utilized for any purpose whatever after being repaired. It does not appear what proportion of its work was interstate and what proportion intrastate in character. In its findings the Industrial Accident Commission stated "that the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent of the whole * * *." In the case of the locomotive involved in the present case now before this court for consideration, none of its work was intrastate in character (within the provisions of the federal act) it when in service, both before and after the accident, being affirmatively shown by the evidence to have been engaged in its every movement in the hauling of shipments in interstate commerce.

In annulling the award of the Industrial Accident Commission in this case the court in its opinion stated, after reviewing many decisions:

"Some general statements in the opinion in the Brizzolara case, *supra*, might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as

they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra*, upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character was as an instrumentality of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence. It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, *supra*, 'the purpose controls, and the business is interstate.' Its future use was not dependent upon 'remote probabilities or accidental later events,' but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction."

This court on January 17th of last year denied a petition for writ of *certiorari* to review this decision, the effect of which was only to uphold the correctness of that decision *upon the particular facts of that case*.

In the opinion in the Brizzolara case the Supreme Court of California recognized an exception based upon just such a state of facts as we now have under consideration, wherein the court says:

"The general test as to the character of the employment is whether the employee is engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof. *Thus, where the instrumentality upon which he was working was operating exclusively in interstate commerce, as in the Parker (L. & N. R. R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 Law Ed. 119) and the Szary (Erie R. R. Co. v. Szary, 253 U. S. 86, 40 Sup. Ct. 454, 64 Law Ed. . . .) cases* * * * *an action under the Federal Employers' Liability Act is the exclusive remedy.*" (The italics are ours.)

It is therefore apparent that the facts of the Winters, Branson and Brizzolara cases are clearly distinguished from the facts of the instant case. In each of the former no exclusive use in interstate commerce prior to the accident, appeared from the evidence, as was shown in the instant case. In none of those three cases was the instrumentality while being worked upon, assigned and destined to return to exclusive service in interstate commerce, as was the fact in the case presently under consideration. Nor in any one of those three cases does it appear that such instrumentality was in fact returned to exclusive interstate service, as was engine 3673, here involved.

Petitioners have disregarded completely the case of *Erie R. R. Co. v. Szary*, 253 U. S. 86, which was referred to by the State Supreme Court in its opinion in the Brizzolara case. In the Szary case it appeared that the employee was injured while crossing certain tracks for the purpose of dumping ashes from the sand drier and to get a drink of water. He had on that evening "sanded" seven engines whose destinations were in other states. There is nothing to show how long those engines had been in the terminal, nor what the character of their previous use had been. This court decided, following the case of *Erie R. R. Co. v. Collins*, 253

U. S. 76, that Szary was performing an act in interstate commerce when injured, and subject to the provisions of the Federal Employers' Liability Act.

Both Szary and Burton were preparing locomotives for service in interstate commerce, and the only possible distinction between the character of service of each is based on the length of time required for the preparation of the locomotive for service. But this alone is not sufficient. The District Court of Appeal pertinently says:

"It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce."

The case of *Law v. Ill. Cent. R. R. Co.*, 208 Fed. 869, Circuit Court of Appeals, 6th Circuit, held that a boilermaker's helper injured in the shops of the railroad company while assisting a boilermaker in repairing a freight engine regularly used in interstate commerce, the engine being at the time in the shops for what is known as "roundhouse overhauling" and dismantled some twenty-one days before the accident, was entitled to the benefits of the Federal Employers' Liability Act. This engine had been regularly used in interstate commerce, was destined to return thereto upon completion of re-

pairs, and did so return almost immediately after the accident. We confidently assert that this case is good law today and that no question is raised with reference to the correctness of that decision by the Winters, Brizzolara, Branson, or other cases cited by petitioners, later reviewed.

Petitioners argue that interstate commerce was moving without present assistance from Burton at the time he received his injury; that no interstate commerce was waiting upon Burton's actions for forwarding. This suggestion is fully answered by a consideration of such cases as *Pedersen v. D. L. & W. R. R. Co.*, 229 U. S. 146. Pedersen in carrying bolts for use in the track, was not furnishing any then present assistance in the movement of interstate commerce, nor was any interstate commerce waiting upon Pederson's action for forwarding.

In the case of *L. & N. R. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 Law Ed. 119, wherein it appeared that a fireman had been killed while running a switch engine for the purpose of reaching out and moving an interstate car and he was held to have been engaged in interstate commerce within the provisions of the Federal Employers Liability Act, the court in its opinion said: "The purpose would control, and the business would be interstate."

Likewise the purpose of Burton's efforts was toward the furtherance of interstate commerce, because the very instrumentality upon which he was working had to be repaired, in order that it might be returned to that very class of service, in accordance with the intention so to do.

The language used by this court in its opinion in the case of *Pedersen v. D. L. & W. R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, is pertinent to the matter now before this court. We refer to the following language:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. *Tracks and bridges* are as indispensable to interstate commerce by railroad as are *engines and cars*, and sound economic reasons unite with settled rules of law in *demanding that all of these instrumentalities be kept in repair*. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its *cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equip-*

ment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping *such instrumentalities* in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (Citing cases.) Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." (The italics are ours.)

This court in that case recognizes the necessity of both *tracks and bridges*, and *engines and cars*, for the operation of a line of railroad, and that there is in each case the same necessity of keeping such instrumentalities in repair.

Petitioners have referred to the case of *C. K. & S. Railway Company v. Kindlesparker*, 246 U. S. 657, reversing same title, 234 Fed. 1, but an examination of the facts of that case as stated in 234 Fed. 1, at page 3, shows that the engine

involved "handled indiscriminately intrastate and interstate freight." The engine was used from March 3rd to April 4th, inclusive, in switching service at Kalamazoo; on March 12th to 14th inclusive in passenger service and on all other days, between March 1st and April 15th, it was not in use. After the repairs were completed it was used from July 7th to 16th inclusive in switching service at Kalamazoo and for four days in that month between July 13th and 20th in freight service between Kalamazoo and Woodbury.

There is not in this case any such clear and definite showing of the connection of the injured party's efforts with the furtherance of interstate commerce such as we have in the case now before the court. The Kindlesparker case, therefore, falls within the same classification as the Winters case, Branson case and others.

With some degree of confidence the petitioners cite the case of *Wright v. Interurban Railway Company*, ... Ia., 179 N. W. 887; *certiorari* denied, 41 Sup. Ct. Rep. 375; however, an analysis of the facts of that case brings it also within the class of the Winters and Branson case, and therefore, no authority for the proposition of law for which petitioners contend. The line of railroad of the Interurban Railway Company extends from Des Moines,

Iowa, to Colfax, Iowa. At the intermediate town of Mitchelville, an electric substation was maintained. It became necessary to make certain repairs upon this substation, and a portable substation was made use of while the repairs were being made. Plaintiff was injured while assisting in this work. It appears that a substation is used in connection with the distribution of electric energy for power purposes. Quoting from the opinion and italicizing certain words which we deem of importance:

"It is stated in the record that the defendant is a common carrier of freights and passengers on its line between Des Moines and Colfax, and *at times* receives freights at its stations consigned to points outside of the state of Iowa, and freights brought into the state by other carriers and delivered to it for carriage to stations on its own lines; and that *in rare instances* it has sold passenger tickets to points outside of the state, but that it neither owns or operates cars or trains outside or beyond the boundaries of the state of Iowa."

Further, it is stated:

"In the record now before us it cannot fairly be said that when injured, plaintiff was engaged in work having any close or immediate relation to interstate commerce
* * *"

The state court held that the plaintiff was not entitled to the benefits of the Federal Employers' Liability Act, and by denial of petition for

writ of *certiorari*, this court approved that decision. This is entirely consistent with the holding in the Winters, Branson and Brizzolara cases for the reason that only "at times" did the carrier handle interstate shipments of freight and only "in rare instances" did it sell passenger tickets to points outside of the state. There is clearly nothing to show a definite and exclusive devotion to interstate commerce, as in the case of engine 3673, in working upon which Burton was injured.

In the case of *Lindway v. Penn. Co.*, Penn. ..., 112 Atl. 40, it appeared that the employee who was injured had charge of an oil tank from which oil for engines and cabooses was drawn, for use in both interstate and intrastate commerce. The injured employee had nothing himself to do with the distribution of the oil and he received his injury while operating a tank car valve which permitted the oil to run from the tank car into the oil storage tank. It was held that his rights were not under the federal act. In the first place his services at most had a remote connection with interstate commerce; but aside from that there is nothing to show that the oil which was being unloaded was destined for interstate use or for anything more definite than as it might be needed. The facts of the case are closely analogous to those

in the case of C. B. & Q. Railroad Company v. Harrington, 241 U. S. 176, where coal was being handled prior to its use in any commerce. Both cases are what may properly be termed "remoteness cases," but in the first of these we have the additional fact that the oil was not destined for exclusive interstate use. Reference may be had in this connection also to the case of Lehigh Valley Railroad Company v. Barlow, 244 U. S. 183, where similar coal movements were involved, with the additional fact that the coal brought in from outside the state had stood in the yard on the cars for several days after the interstate movement had been completed.

In C. R. I. & P. Railway Company v. Industrial Accident Commission, 288 Ill. 126, 123 N. E. 278, it appeared that the locomotive involved was one of five engines "used principally for interstate runs," but that it was used as the exigencies of the company required. "At times engine 2008 was used in intrastate service." "At the time Kraujalis was at work on the engine it had not been assigned to any particular train." The facts of this case, therefore, bring it also within the rule of the Winters case.

In Foley v. Hines, 111 Atl. 715; *certiorari* denied, 41 Sup. Ct. Rep. 450, it appeared that

the workman was injured while discharging coal from a steamer onto cars and onto a pile in the railroad yards for use at some future time as the business of the railroad might require, but no part of it was appropriated or segregated for interstate use. This case also turns upon the matter of remoteness and the failure of any definite segregation or assignment to connect the employee's efforts with interstate commerce.

The case of *Herzog v. Hines* (N. J.), 112 Atl. 315, merely follows the rule of the *Winters* and *Brizzolara* cases, the car being repaired having been used indiscriminately, and without assignment while repairs were being made.

In *Hines v. Baechtel*, 113 Atl. 126; *certiorari* denied, 41 Sup. Ct. Rep. 537, it appeared that a messenger employed by a railroad company, all of whose trains moved interstate, was killed while crossing tracks in taking to the station a coal report for transmission to the superintendent in another state. There was nothing in the case to connect the deceased with the movement of interstate business, except possibly very remotely. In no case have the courts gone so far as to hold that if a railroad is engaged in interstate business solely, each and every of its employees come within the provisions of the Federal Employers' Liability Act. The cases

upon the matter of remoteness have stated quite definitely the principles by which the line of demarcation is determined.

Petitioners have cited the case of *Payne v. DeMott* (Ga.), 106 S. E. 9, where it appeared that a boilermaker was injured while washing out a locomotive. The court states with reference to the character of service,

"The only evidence showing the use of this engine is contained in the train sheet. This shows that this engine was a part of a work train with limits entirely within the state of Georgia from July 1st, 1919, to December, 1919."

There was no showing whatever of a definite intention with respect to the use of the engine after the work done on it was completed. The court further remarked that there was in this case "no fixed destination or work."

The case of *C. R. I. & P. Railway Company v. Cronin* (Okla.), 176 Pac. 919, is the only case measurably supporting petitioners' contentions, and even in this case it does not appear that the engine while in the shop was definitely assigned to the interstate run which it made after the repairs were completed, although it is stated that the repairs were made in time for the engine to be placed back in service on its regular trip from Sayer, Okla., to Amarillo, Texas, although from customary use some sort of as-

signment may be inferred. This case has apparently not been brought to the attention of this court but, if and when it is, we feel that it should and will be reversed for the same reason that the decision of the state court in the instant case should be affirmed.

In the case of Hudson M. R. Co. v. Iorio, 239 Fed. 855, it appeared that the injured employee was at the time of his injury engaged in picking up for storage certain rails lying along the right of way and not a portion of the tracks at the time. There is nothing in the case to connect Iorio with interstate commerce inasmuch as it does not appear that the rails were assigned for use in any track for the movement of interstate shipments. Their interstate character had simply been terminated. This may not be said of engine 3673, for it was being repaired in order that it might be returned to its interstate service.

In the case of Director General v. Bennett, 268 Fed. 767, *certiorari* denied, 254 U. S.—, 41 Sup. Ct. Rep. 218, it was held that the rights of a locomotive engineer who had completed a yard shifting movement in furtherance of interstate commerce, and was injured by insufficient clearance of cars while taking his engine to the roundhouse, either to put it up for the night or to receive further orders, were under

the provisions of the Federal Employers' Liability Act. In this case the interstate service was completed, and there was no assignment as to future service, as was the case of the locomotive upon which Burton was working when injured.

A case similarly holding is *O'Brien v. U. S. Railroad Administration*, 185 N. Y. Supp. 447 (citing the case of *Erie Railroad Company v. Winfield*, 244 U. S. 170), where it appeared that an engineer, who handled both interstate and intrastate commerce during the day, was injured while putting his engine up for the night.

In *Rabee v. Boston and Maine Railroad Company*, 189 N. Y. Supp. 863, it was held that a member of a railroad switching crew, injured while walking through the railroad yards to the company's office to which the crews reported for the days' work, was engaged in interstate commerce within the provisions of the Federal Employers' Liability Act, where he had been switching interstate cars on the preceding day and the crew, of which he was a member, immediately after the injury was engaged in switching cars containing interstate freight.

From all of the above it must be clear that where as in the instant case a locomotive has been used in interstate work exclusively for a period of several months, and is taken into the shop for necessary repairs in order that it may

continue in that character of service upon a division, one terminal of which is in one state, the other in another, and while in the shop it was the intention to return it to the same service, which was in fact done after the repairs were completed, and the injured person was injured while making such repairs, his efforts were directly and proximately directed to the furtherance of interstate commerce, and his rights, therefore, governed by the Federal Employers' Liability Act; his work under those circumstances was, we submit, in every reasonable and practical sense (*Shanks v. D. L. & W. Ry. Co.*, 239 U. S. 556) so intimately connected with interstate commerce as practically to be a part of it.

III.

The Facts of This Case Are Not Analogous to Those of Cases Involving New Construction.

The repairs being made to the particular engine were what are known as class C-3, in accordance with government classification; they comprised a general mechanical overhauling, repairing of flues and the installation of a superheater.

In practically no cases are repairs to locomotives or any piece of machinery made without the installation of certain new parts. Other-

wise repairs would more properly be called adjustment. In the present instance a new appliance was being installed, namely: a super-heater, but it appears from the record that Burton was not working in connection with the super-heater, but was fitting a reinforcement to the air pump bracket and it was necessary to drill and tap some holes for studs to hold these brackets on. (Printed Record, p. 49.)

When this engine came out of the shop it was the same engine that went into the shop except that it was in a better state of repair. Its identity as locomotive No. 3673 was unchanged.

This situation is in no way analogous or similar to the case of new construction as referred to by petitioners. They cite for example the case of *Raymond v. C. M. & St. P. Railroad Company*, 243 U. S. 43, involving the construction of a tunnel or roadbed, which at the time of the injury was not fully completed, and had never been devoted to the movement of interstate commerce in any respect. Were engine 3673 being newly constructed at the time Burton was injured, but never before having been used in interstate service, then the cases would be more nearly parallel; but as a matter of fact he was working on an engine, an instrumentality theretofore used exclusively for several months in interstate work and being repaired in order that it might be restored to that service. The instant case, therefore, falls clear-

ly within the class of repair cases. No more time or space need be devoted to the answer to petitioners' third point than was used by petitioners in its statement; in fact, its mere statement is its answer.

IV.

Notwithstanding Whatever Desirability There May Be for an Easily Applicable Rule for the Determination of Jurisdictional Questions in Cases Involving Injuries Sustained by Railroad Shopmen, This Is Not the Determinative Consideration Because Jurisdictional Questions Turn Upon an Application of the Law Relating to Matters of Jurisdiction to the Facts of Each Particular Case. Congress Itself Has Never Seen Fit to Attempt a Definition of the Field, Nor Could It in Any Event Override Constitutional Provisions. The Question Is in Each Case, After the Facts Are Determined, a Purely Judicial One. It Would Be Clearly Without Authority in Law to Allow Matters of Mere Convenience to Vary One Way or Another the Line of Demarcation Between Those Cases Falling Within the Provisions of the Federal Act, and Those Not.

In answer to the fourth subdivision of petitioner's argument, it need only be said that

notwithstanding whatever desirability there may be for an easily applicable rule for the determination of jurisdictional questions in cases involving injuries sustained by railroad shopmen while working upon rolling stock, jurisdictional questions turn upon the facts of the particular case; and as stated in the case of *Shanks v. D. L. & W. Railroad Co.*, 239 U. S. 556 and other cases, the test is whether the employee at the time he received the injury was engaged in interstate commerce or in work so closely connected therewith as practically to be a part thereof. This is a judicial question in each case.

Could this court lay down a rule of thumb method for the determination of what cases come within the provisions of the Federal Employers' Liability Act and what are governed by the various State Workmen's Compensation Acts, it would undoubtedly relieve the courts of some effort. But the cases already decided by this court have drawn the line with such certainty as to render comparatively simple the determination of jurisdictional questions. It is true that locomotives and cars ordinarily when being worked upon are not marked to show the character of service in which they have been engaged, nor the character of service to which

destined. These facts can only be brought out upon some investigation. If, as in the instant case, an engine has been devoted exclusively to interstate work prior to its shop repairs, and is destined while being repaired to return to the same character of work, and actually does so return, undoubtedly any workman injured while working thereon, whether he knows those facts or not, is entitled to the benefits conferred by the Federal Employers' Liability Act.

It would be clearly without authority in law to allow matters of mere convenience to vary one way or another the line of demarcation between those cases falling within the provisions of the federal act and those falling within the provisions of the various state acts.

Petitioners state that any distinction based upon the character of the use of the engine or car while in service is contrary to the purposes of the Federal Employers' Liability Act. This statement is, we submit, without substantiation whatever in law. The test is the character of the use, as is clearly illustrated by all of the cases relating to the subject.

Conclusion.

For the foregoing reasons respondent respectfully submits that the decision of the District

Court of Appeal of the state of California, Second Appellate District, Division Two, is sound and right, and should by this court be affirmed.

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Opinion of the District Court of Appeal.

November 26, 1920.

In the District Court of Appeal of the state of California, Second Appellate District, Division Two. Civil No. 3296.

John Barton Payne, as agent under section 206, subdivision (b) of the Transportation Act, 1920 (substituted for Walker D. Hines), petitioner, v. Industrial Accident Commission of the State of California, and O. J. Burton, respondents.

(1) *Workmen's Compensation Act—Injury to workmen in railroad repair shops—Engine engaged in interstate commerce—Lack of jurisdiction of Industrial Accident Commission—An employee engaged in repairing an engine in the general shops of the railroad company in this state, which engine had been used several months exclusively in interstate commerce, and which had been placed in the shops for general overhauling, whereupon it was the intention to return it to its regular service, and which was, in fact, so returned, is engaged in work so intimately connected with interstate commerce as practically to be a part of it, and the Industrial Accident Commission has no jurisdiction to make an award of compensation for injuries to such employee received while tapping the boiler of the engine.*

Application for *certiorari* to review an order of the Industrial Accident Commission awarding compensation for injuries. Award annulled.

ON PETITION FOR WRIT OF REVIEW.

For petitioner—Fred E. Pettit, Jr., E. E. Bennett.

For respondents—A. E. Graupner; Warren H. Pillsbury, of counsel.

This proceeding was brought to review the action of the Industrial Accident Commission of California in awarding compensation to one O. J. Burton for injuries sustained by him in the line of his employment under Walker D. Hines, director general of railroads, operating the Los Angeles and Salt Lake railroad.

On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad. On the 19th of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed

until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of "breaking in" after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.

The sole question presented for our consideration is: Was the engine, at the time of the accident, engaged in interstate commerce, within the meaning of the Federal Employer's Liability Act (35 U. S. Stats., 65)?

The answer to this simple proposition is rendered difficult by the apparent conflict of decisions of the various courts, federal and state,

which have been called upon to apply the law to the facts in issue in particular cases. It is complicated by reason of the fact that no fixed rule has been established by the Supreme Court of the United States for the application of the statute. It was held that each case must be decided in the light of the particular facts with a view to determining whether, at the time of the injury, the employer is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof. (*New York C. & H. R. Co. v. Carr*, 238 U. S. 260.) Where the employer is engaged in both intrastate and interstate commerce, and the instrumentalities are used indiscriminately in both, the line of demarkation between the two classes of business is exceedingly difficult to trace. A resume of some of the decisions will serve to illustrate this point.

In *Louisville & Nashville R. Co. v. Parker*, 242 U. S. 13, the employee was engaged in switching a car not moving in interstate commerce from one track to another, for the purpose of reaching and moving an interstate car; and it was held that he was engaged in interstate commerce. The court says: "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, and doing the act for the purpose of furthering the later work."

New York C. R. Co. v. Carr, *supra*, was a case where two cars carrying interstate freight were uncoupled from an interstate train and

backed into a siding, where the employee was injured. We quote from the decision: "The matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefit of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

In the case of *Eric R. Co. v. Winfield*, 244 U. S. 170, an employee was in charge of a switch engine which was used in switching cars about in the yard, especially to and from a transfer station, some cars containing interstate freight, other intrastate, and still others carrying both classes. After completing his day's work, he put his engine away and started to leave the yard. While crossing the track on his way out, he was struck by an engine and killed. It was held that, as his work was particularly interstate, and his leaving the yard was a necessary incident to his employment, he was at the time engaged in interstate commerce within the purview of the federal act.

New York C. R. Co. v. Porter, 249 U. S. 168, determined that a workman engaged in removing snow from tracks used for the transportation of interstate and intrastate commerce was entitled to compensation under the federal law.

In *Philadelphia B. & W. R. Co. v. Smith*, 250 U. S. 101, the employee was the cook of a construction crew which was employed in repairing bridges at different places along the line. The court stated that as he was actually assisting the bridge carpenters by keeping their bed and board close to their place of work, he was engaged in interstate commerce.

Pederson v. Delaware L. & W. R. Co., 229 U. S. 146, decided that an employee who was carrying bolts to be used in repairing an interstate railroad, and was injured by an interstate train while performing that duty, was within the terms of the federal statute.

Shanks v. Delaware L. & W. R. Co., 239 U. S. 556, enunciates the principle that a workman employed in removing and installing fixtures in a machine shop which is conducted for repairing locomotives used in both interstate and intrastate transportation is not entitled to the benefit of the federal act. The court in its opinion says: "The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation."

In the case of *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, the workman was employed with a crew in switching cars of coal to sheds, where it was placed in chutes, thence to be used to supply coal to engines engaged in both classes of transportation. The court

held that he was not in interstate commerce, stating that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

The above citations will suffice to indicate the subtle distinctions which have been drawn by the Supreme Court of the United States in interpreting and applying the Federal Employer's Liability Act.

Coming now to the decisions of our own Supreme Court construing these authorities, we encounter a direct conflict which adds to the difficulty of reaching a satisfactory solution of the problem.

In the case of *Southern Pacific Co. v. Pillsbury*, 170 Cal. 782, the Industrial Accident Commission of California had assumed jurisdiction, under substantially the following facts: A workman named Ruth was repairing a switch engine which had been withdrawn from service in the yard at Roseville Junction, California, where some seventy per cent of the switching was interstate commerce work. While thus engaged, Ruth received injuries resulting in his death. The accident occurred during the time the engine was in the roundhouse undergoing repairs, and three days before it was restored to service. Our Supreme Court annulled the award, after discussing the decisions of the federal courts, some of which we have cited. On May 21, 1917, without filing an opinion, the Supreme Court of the United States denied a petition for a writ of *certiorari* whereby it was sought to review the decision of the state court.

On January 8, 1917, the Supreme Court of the United States rendered an opinion in the case of *Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, from which we quote: "The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both interstate and intrastate commerce, and it was so used after plaintiff's injury.' The last time before the injury was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to any kind of traffic, and it does not appear that *this engine was destined especially to anything more definite than such business as it might be needed for*. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa*, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depends upon its employment at the time, and not upon *remote probabilities* or upon *accidental later events*." (Italics ours.)

On the authority of this Winters case, our Supreme Court, in *Hines v. Industrial Acct.*

Com., 60 Cal Dec. 365, filed October 4, 1920, affirmed an award to one Brizzolara, under circumstances somewhat similar to those in the Ruth case, *supra*. The finding of the commission in the Brizzolara case was as follows: "That at the time of said injury and death said employee was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That when in service, said switch engine was used in both interstate and intrastate traffic. That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent of the whole." After quoting from the decisions of the United States Supreme Court, the opinion proceeds to state that the ruling in the Ruth case is at variance with the holding in the Winters case, and that the Ruth case, therefore, cannot be considered as controlling, notwithstanding that the Ruth case was affirmed by the United States Supreme Court some four months after the Winters case was decided.

Some of the other adjudications of our Supreme Court are illuminating upon this intricate problem. It has been held that a watchman at a railroad crossing used for both interstate and intrastate traffic is engaged in interstate business while employed in keeping the track clear of obstructions in order to facilitate the passage of interstate trains. (*Southern Pacific Co. v. Industrial Acc. Com.* [Rolfe case], 174 Cal. 8; *Southern Pacific Co. v. Industrial Acc. Com.* [Smith case], 174 Cal. 16.) An electric line-

man employed in the removal of an overhead telephone wire which had fallen on the trolley wire used by a railroad for furnishing electric power for the operation of cars of the railroad's interstate and intrastate passenger system, was engaged in interstate commerce, as he was then engaged directly in removing an obstruction to the operation of an instrumentality in actual use for purposes of such commerce. (*Southern Pacific Co. v. Industrial Acc. Com.* [Covell case], 174 Cal. 19.)

In the case of *Southern Pacific Co. v. Industrial Acc. Com.*, 178 Cal. 20, one Butler was killed by an electric shock received while he was wiping insulators on the main power line of an interstate and intrastate system, between the power house and substations. The electric energy was generated at this power house and conveyed in an alternating current of high voltage to the substations, there converted and transformed to a direct current of reduced voltage, thence passed to the trolley wires, and from there to the motors on the cars. Our Supreme Court applied the principle of the *Harrington* case, *supra*, and decided that the work being done by Butler was analogous to the situation of an employee loading coal chutes for the supply of interstate engines, and held that Butler's employment was too remote from interstate commerce to bring him within the federal statute. This action was reversed by the Supreme Court of the United States (40 Sup. Ct. Rep. 130), the court saying: "Generally, when applicability of the Federal Employer's Liability

Some general statements in the opinion in the Brizzolara case, *supra*, might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra*, upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence. It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, *supra*, “the purpose controls, and the business is interstate.” Its future use was

not dependent upon "remote probabilities or accidental later events," but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled.

WELLER, J.

We concur:

FINLAYSON, P. J.

THOMAS, J.

Proof of Service.

State of California, County of Los Angeles—ss.

Francis J. Mieding, being first duly sworn, deposes and says:

That he is a clerk in the office of A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett, three of the attorneys of record for the respondent herein, and that they and affiant have their office and place of business at 504 Pacific Electric Bldg., Los Angeles, California; that the other attorneys whose names are subscribed to the foregoing brief in answer to petitioner's brief on *certiorari*, have their office and place of business in the city of Washington, D. C. that Warren H. Pillsbury, the attorney for petitioners in the above entitled proceeding, is a member of the legal staff of the Industrial Accident Commission of the state of California, and has his office at the office of said commission, 525 Market street, San Francisco, California; that there are United States post offices in both the city of Los Angeles and the city of San Francisco, with regular daily communication by mail between said cities; that on the 17th day of February, 1922, affiant served the foregoing brief in answer to petitioner's brief on *certiorari* upon said Warren H. Pillsbury, by depositing on said date, in the United States post office at Los Angeles, California, properly enclosed in a sealed envelope, three true and correct copies of the said foregoing brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Mr. Warren H. Pillsbury, c/o Industrial Accident Commission of the state of California, 525 Market street, San Francisco, California."

FRANCIS J. MIEDING,

Subscribed and sworn to before me this 17th day of February, 1922.

(Seal)

AMELIA GUEST,
Notary Public in and for the County of Los Angeles, State of California.



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2. The second part of the book is devoted to a description of the various types of fossils which are found in the region. This is done in a very clear and concise manner, and the reader is enabled to understand the nature of the fossils and the conditions under which they were formed.

3. The third part of the book is devoted to a description of the various types of plants which are found in the region. This is done in a very clear and concise manner, and the reader is enabled to understand the nature of the plants and the conditions under which they were formed.

4. The fourth part of the book is devoted to a description of the various types of animals which are found in the region. This is done in a very clear and concise manner, and the reader is enabled to understand the nature of the animals and the conditions under which they were formed.

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IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1920.

Industrial Accident Commission of the
State of California and O. J. Burton,
Petitioners,

vs.

John Barton Payne, as Agent Under
Section 206, Transportation Act,
1920 (Los Angeles & Salt Lake
Railroad Company),

Respondent.

**Brief in Answer to Petition for Writ of Certiorari
to the District Court of Appeal of the State of
California, Second Appellate District, Division
Two.**

*To the Honorable, the Chief Justice and the
Associate Justices of the Supreme Court of
the United States:*

While the respondent is not required by the
statutes or rules of court to file a brief in an-
swer to a petition for a writ of *certiorari*, the
instructions relative to applications for writs of

certiorari under the acts of March 3, 1891, and September 6, 1916, contemplate his doing so if he desires to oppose the petition. In this case it is deemed desirable to file such a brief in order primarily to point out clearly the facts upon which this case turns, and the clear line of distinction between the facts of this case and those of the cases upon which petitioners mainly rely.

This Case has been Fully and Carefully Considered both by the District Court of Appeal of the State of California and by the Supreme Court of that State, with Elaborate Briefs Before Them, and in the Light of all the Cases so far Decided, Including the Recent So-called Brizzolara Case (Payne v. Industrial Accident Commission of the State of California, Cal.; 60 Cal. Dec. 365; 192 Pac. 859), in Which a Petition for Writ of Certiorari was Denied by this Court on January 17th of this Year.

Upon a writ of *certiorari*, which is the method provided by law in this state for the review of awards of the Industrial Accident Commission, the District Court of Appeal, Second Appellate District, Division Two, reviewed the award originally made by that commission in favor of O. J. Burton, one of the present petitioners, and on November 26, 1920, rendered its decision and

by its order annulled the award theretofore made in favor of O. J. Burton. A copy of the opinion of that court appears on pages 14 to 25 inclusive, of the petition for writ of *certiorari* herein filed, and for the convenience of the court a copy of that opinion is also set forth next following this brief, pages 33 to 43, inclusive, hereof.

On October 4, 1920, the Supreme Court of this state rendered its decision in the so-called Brizzolara case (*Payne v. Industrial Accident Commission of the State of California*, Cal., 60 Cal. Dec. 365, 192 Pac. 859, in which a petition for writ of *certiorari* was denied by this court on January 17th of this year), and on November 1st, 1920, that court denied a petition for rehearing. At the time of the decision of the District Court of Appeal in the instant case, namely, November 26, 1920, it had before it the opinion of the state Supreme Court in the Brizzolara case, and the District Court of Appeal in its opinion in this case took occasion to review the Brizzolara case, and, as will be more in detail later on in this brief referred to, clearly distinguished its facts from those of the case presently under consideration.

Full briefs were filed with the District Court of Appeal prior to its original decision; thereafter the present petitioners made application for a rehearing by that court, and upon that appli-

cation briefs were again filed by the respective parties. That application for rehearing was denied by the District Court of Appeal on December 24, 1920.

Thereafter the present petitioners filed an application for hearing of the case by the Supreme Court of this state. Again briefs were filed by the respective parties. On January 24, 1921, the Supreme Court of the state of California denied the petition for hearing in that court. In the meantime, and on January 17, 1921, the Supreme Court of the United States denied the petition for a writ of *certiorari* in the so-called Brizzolara case.

It is at once apparent that this case has had the fullest and most careful consideration, both by the District Court of Appeal and by the Supreme Court of this state, presented by the parties as it has been upon numerous and elaborate briefs. Those courts each had before them, in passing upon the facts of the present case and the law applicable thereto, the recent Brizzolara case, and by the original decision and opinion herein rendered, and the denial of the petition for rehearing, and the denial of the petition for hearing in the Supreme Court of the state, clearly marked out and established the line of distinction between the two cases upon their respective facts. Likewise, with respect to other cases relied upon by petitioners.

The respondent will not attempt to review in this brief the numerous decisions considered in the briefs filed in the state courts, but will devote himself to a pointing out of that clear line of distinction between the facts of the present case under consideration, and those of the cases upon which petitioners rely.

Respondent will in general follow the outline of argument used by petitioners in their brief, answering each of petitioners' points in the order there stated.

As has been observed many times by this court and other courts in passing upon similar cases, each case is to be decided upon its particular facts; therefore, in order that the issue may be clearly presented to the court, a statement of the facts is proper at this time.

THE FACTS IN THIS CASE.

As admitted there is little, if any dispute as to the facts in this case, and respondent need only quote from the opinion of the District Court of Appeal, commencing at the beginning of that opinion:

"This proceeding was brought to review the action of the Industrial Accident Commission of California in awarding compensation to one O. J. Burton for injuries sustained by him in the line of his employment under Walker D. Hines, director general of railroads, operating the Los Angeles & Salt Lake Railroad.

"On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad. On the nineteenth of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of 'breaking in' after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919,

when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

“This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.”

Again, omitting that portion of the opinion wherein the numerous cases are reviewed, the District Court of Appeal in concluding its opinion stated:

“Some general statements in the opinion in the Brizzolara case, *supra*, might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra*, upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence. It does not appear that it was intended for such service in the future, or that it was utilized

for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, *supra*, 'the purpose controls, and the business is interstate.' Its future use was not dependent upon 'remote probabilities or accidental later events,' but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

"In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction."

In the language of the District Court of Appeal, as appears above, the critical facts upon which this case turns, are expressed in the following language:

"Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use."

Statement of Respondent's Position and Contention.

Respondent, with the utmost confidence in the correctness of his position, asserts and claims that the facts of the instant case are clearly distinguishable from those in the cases of *Minneapolis & St. L. R. R. Co. v. Winters*, 242 U. S. 353, *B. & O. R. R. Co. v. Branson*, 242 U. S. 623, and *Payne v. Industrial Accident Commission* (the *Brizzolara* case), . . . Cal. . . ., 60 Cal. Dec. 365, 192 Pac. 859, in which a petition for writ of *certiorari* was denied by this court on January 17th of this year, upon which cases petitioners mainly rely; and that the decision of the District Court of Appeal of this state, in respect to which a rehearing by that court was denied, and a hearing in the Supreme Court of the state of California was by the Supreme Court thereafter denied, was sound and right; and that this petition for a writ of *certiorari* should therefore be denied.

ARGUMENT.

Considering first the case of *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, we respectfully quote a portion of that opinion, ourselves italicizing some of the language there used by the court:

"The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had

been used in the hauling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was again on October 21, after the accident, to pull a freight train out from the same place. *That is all we have, and is not sufficient to bring the case under the act.* This is not like a matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, *and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for.* It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen.* At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at the time, *not upon remote probabilities or upon accidental later events."*

In that case the facts appeared merely by stipulation that the engine "had been used in the handling of freight trains over the defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." The

last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was again, on October 21, after the accident, used to pull a freight train out of the same place. The stipulation simply failed to show such a character of user as to bring the case within the federal act.

This court in its opinion observed, "it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for." In the case now before this court for consideration, the engine prior to its being brought into the shops for repairs had been used exclusively in interstate commerce; it was being repaired in order that it might continue in this line of work, and while in the shop was destined to return to the same, and after the repairs were completed it actually did resume its work exclusively in interstate commerce.

Further, in the opinion in the Winters case, this court stated: "Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen." But in the instant case it clearly and affirmatively appears from the evidence that its next work should be interstate, being assigned as it was to a desert division, one terminus of which is in California, the other in Nevada (which fact of itself is of only incidental

importance so long as shipments interstate were being moved), and it was in fact actually returned to that exclusive character of service. Likewise its work did not depend "upon remote probabilities or upon accidental later events."

On page 5 of the petition in this case, it is stated that this locomotive had been used for several months before being sent to the repair shop, for the purpose of hauling through freight trains across the division to which it was assigned, the western terminus of the division being in California and the eastern terminus in Nevada; and petitioner continues: "It may also have hauled local and intrastate freight, at times, in the same division." For fear that the quoted sentence may cause some misunderstanding, it should be stated, and petitioners will not deny the fact, that the locomotive in question at no time hauled any intrastate freight when at the same time it did not haul also interstate freight. The engine operated and was assigned to the desert run crossing the state line, and was engaged exclusively in interstate work as shown by the evidence, although petitioners infer without any supporting evidence that it may, at times, have moved some intrastate shipments. No citation of authority is longer required for the proposition that if a locomotive is engaged in hauling interstate freight, it is an instrumentality of interstate commerce within the pro-

visions of the Federal Employers Liability Act, although in the same train there may be an intrastate shipment. As a part of its breaking in process after the shop work was completed, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, in each train there being shipments moving in interstate commerce, as was clearly disclosed by the evidence. A few days later, after some further minor adjustments were made, the engine was sent out hauling a train containing interstate freight, and resumed its former desert run handling shipments moving interstate.

As stated by the petitioners, the record is free from dispute as to the facts. The legal conclusions to be drawn from those facts were all that was before the District Court of Appeal of California, and that is the issue in this proceeding.

Petitioners assert, in their attempt to bring the facts of the present case within the rule of the Winters case, that an irrevocable dedication of an engine to a particular kind of traffic cannot be and is not made, and that it is not shown that this engine was of such a type of construction that it could be usable only in interstate commerce. This, even if true, obviously does not in any way affect the correctness of the decision rendered by the state courts. Indeed, a roadbed is not of such a type of construction that

it is usable only in interstate commerce, as opposed to intrastate traffic, nor in fact, can this statement be applied to any instrumentality of a railroad company. The test is based upon the character of the usage to which assigned and devoted, and the fact remains in the instant case that the engine in question prior to the injury, was used exclusively in interstate traffic; that it was shopped in order that it be kept in condition economically and well to continue its handling of such traffic to which, while in the shop it was assigned, and that after the shop work was completed, it was actually restored to its service exclusively in interstate commerce (exclusively, in the sense that in all its movements it handled shipments moving interstate, and hence, exclusively, within the provisions of the Federal Employers Liability Act and decisions interpreting the same). To use the language of the District Court of Appeal, "so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined."

In *Rausch v. B. & O. R. R. Co.*, 243 Fed. 712, the court there said, referring to the *Winters* case:

"If * * * the engine (in the *Winters* case) had been permanently devoted to interstate commerce, a different result would follow from the reasoning of Mr. Justice Holmes."

The New York courts have recognized this distinction in the case of *Palermo v. Erie R. R. Co.*, 173 N. Y. Supp. 456, involving an injury to an employee who was engaged in placing on a storage track a locomotive which had come in from an interstate run and which the evidence disclosed had been used on that interstate run for a considerable period of time. In discussing this matter the court said:

"I think that if the locomotive in question was regularly devoted to the work of drawing the Tuxedo express from Newburgh to Jersey City and back to Newburgh, and so in interstate commerce, that *everything* that was done incidental to this use of the locomotive was also directly related to interstate commerce. * * * On the other hand, if this locomotive was not in the regular course of business assigned to this run and its use next day undetermined when it was laid up for the night, then the doctrine of the *Winters* case, *supra*, would govern."

The same distinction was noted in *Central R. R. Co. v. Sharkey*, 259 Fed. 144, and in *Atlantic Coast Line v. Woods*, 252 Fed. 428. In the latter case the court said:

"The case at bar, as we have stated, is distinguishable from the cases relied on by counsel for plaintiff (*Winters* case), *inasmuch as the engine was taken out of interstate commerce for the express purpose that it might be repaired to enable it to continue as an instrument of commerce.*" (The italics are ours.)

Had the Supreme Court of the United States intended to enunciate the rule which the petitioners here contend for, that no locomotive withdrawn from service for repairs could be held an instrumentality of interstate commerce while so withdrawn, how easy it would have been for the court in deciding the Winters case to say so. But by its very language there used, it showed that under other states of fact (no facts there appearing other than the brief stipulation), the result might be different.

In its opinion in the Winters case, this court stated:

“Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen.”

There was nothing indefinite about the work of the engine in the case at bar; the character of its work before it was shopped, its being destined to return to the same character of work when shop work was completed, and the fact that it actually did return thereto.

The District Court of Appeal in its opinion clearly distinguishes the present case from the Winters case in the following language:

“The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote probabilities or accidental later events.”

And, further :

"The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service upon completion of the necessary repairs, and was so returned when placed in condition for such use."

In the case of *B. & O. R. R. Co. v. Branson*, 242 U. S. 623, 61 Law Edition 534, same case below, 128 Md. 678, 98 Atl. 225, which will hereafter be referred to as the Branson case, it appeared that a painter who was employed in a railroad shop to paint cars and engines, contracted a metallic poisoning from the paints, and filed suit under the Federal Employers Liability Act charging negligence. This court in a memorandum decision under the authority of *D. L. & W. R. R. Co. v. Yurkonis*, 238 U. S. 439, *C. B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177, *Shanks v. D. L. & W. R. R. Co.*, 239 U. S. 556, and *M. & St. L. R. R. Co. v. Winters*, 242 U. S. 353, held that the plaintiff in the original action before the state court was not at the time of receipt of his injury engaged in interstate work so as to entitle him to the benefits of the Federal Act. The Branson case must be considered only at most, a companion of the Winters case. In the Branson case it cannot be determined whether the employee was when injured

working on engines or cars; it cannot be determined from whence they had come or whither they were going; it cannot be determined what character of work they had been engaged in before they were painted, nor what character of work they were destined to perform after the painting was completed. Very probably the contraction of the poisoning was more or less gradual. The Branson case, therefore, adds nothing to the doctrine of the Winters case; in fact, the evidence in the former lacked in several respects the definiteness of that of the latter. In the Winters case there was no question as to the identity of the engine which was being worked upon at the time of the injury, while in the Branson case there was no showing as to what engines or cars the injured party was working upon when he contracted the poisoning, nor, indeed, was such a showing possible. In the Winters case the stipulation afforded some information as to the use made of the instrumentality in question, both before and after the injury. This information was of course, under the circumstances, totally lacking in the Branson case.

In the Brizzolara case, which has been referred to above, the opinion in which case was before the District Court of Appeal at the time it rendered its decision in the instant case and in respect to which the petition for writ of

certiorari had been denied by this court at the time the Supreme Court of the state of California denied a hearing of this case, it appeared that the switch engine involved in the Brizzolara case was used in the movement of both interstate and intrastate traffic, being at one time engaged in one service, at another time in the other. It does not there appear that it was intended for any particular service for the future, either interstate or intrastate, or that it was in fact utilized for any purpose whatever after being repaired. It does not appear what proportion of its work was interstate and what proportion intrastate in character. In its findings the Industrial Accident Commission stated "that the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent of the whole * * *". In the case of the locomotive involved in the present case now before this court for consideration, none of its work was intrastate in character, it at all times when in service, both before and after the accident, being affirmatively shown by the evidence to have been engaged in the movement of interstate commerce.

In affirming the award of the Industrial Accident Commission in that case the court in its opinion stated, after reviewing many decisions:

"It follows that at the time of the accident Brizzolara was not 'engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof.'"

This court on January 17th of this year denied a petition for writ of *certiorari* to review this decision, the effect of which was only to uphold the correctness of that decision upon the particular facts of that case.

In the opinion in the Brizzolara case the Supreme Court of this state itself recognized an exception based upon just such a state of facts as we now have under consideration, wherein the court says:

"The general test as to the character of the employment is whether the employee is engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof. *Thus, where the instrumentality upon which he was working was operating exclusively in interstate commerce, as in the Parker (L. & N. R. R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 Law Ed. 119) and the Szary (Erie R. R. Co. v. Szary, 253 U. S. 86, 40 Sup. Ct. 454, 64 Law Ed....) cases* * * * *an action under the Federal Employers Liability Act is the exclusive remedy.*" (The italics are ours.)

It is therefore apparent that the facts of the Winters, Branson and Brizzolara cases are clearly distinguished from the facts of the in-

stant case. In each of the former no exclusive use in interstate commerce prior to the accident, appeared from the evidence, as was shown in the instant case. In none of those three cases was the instrumentality while being worked upon, assigned and destined to return to exclusive service in interstate commerce, as was the fact in the case presently under consideration. Nor in any one of those three cases does it appear that such instrumentality was in fact returned to exclusive interstate service, as was engine 3673, here involved.

In their petition herein filed, petitioners have disregarded completely the case of *Erie R. R. Co. v. Szary* which was referred to by the State Supreme Court in its opinion in the *Brizolara* case. In the *Szary* case it appeared that the employee was injured while sanding an engine which had been used in interstate commerce and which was actually returned to that service. The facts there stated do not indicate how long this operation took, nor how long the engine in question was in the shop or roundhouse. This court decided that *Szary* was performing an act in interstate commerce when injured, and subject to the provisions of the Federal Employers Liability act.

The case of *Law v. Ill. Cent. R. R. Co.*, 208 Fed. 869, Circuit Court of Appeals, 6th Circuit, held that a boilermaker's helper injured in the

shops of the Railroad Company while assisting a boilermaker in repairing a freight engine regularly used in interstate commerce, the engine being at the time in the shops for what is known as "roundhouse overhauling" and dismantled some twenty-one days before the accident, was entitled to the benefits of the Federal Employers Liability Act. This engine had been regularly used in interstate commerce, was destined to return thereto upon completion of repairs, and did so return almost immediately after the accident. We confidently assert that this case is good law today and that no question is raised with reference to the correctness of its decision by the Winters, Brizzolara or Branson cases.

Petitioners argue that interstate commerce was moving without present assistance from Burton at the time he received his injury; that no interstate commerce was waiting upon Burton's actions for forwarding. This suggestion is fully answered by a consideration of such cases as *Pederson v. D. L. & W. R. R. Co.*, 229 U. S. 146. Pederson in carrying bolts for use in the track, was not furnishing any then present assistance in the movement of interstate commerce, nor was any interstate commerce waiting upon Pederson's actions for forwarding. While the use of the engine in question upon a division in part in the state of Cali-

fornia and in part in the state of Nevada, has significance, the testimony in the present case further shows that the engine handled interstate commerce in all its movements, even while used in its breaking-in runs upon the San Pedro district; hence, regardless of its crossing a state line upon its regularly assigned division, its character of service was interstate at all times. In the case of *L. & N. R. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 Law Ed. 119, wherein it appeared that a fireman had been killed while running a switch engine for the purpose of reaching out and moving an interstate car and he was held to have been engaged in interstate commerce within the provisions of the Federal Employers Liability Act, the court in its opinion said: "The purpose would control, and the business would be interstate." Likewise, *O. J. Burton* was engaged at the time of his injury in the repair of a locomotive which had been used exclusively in interstate commerce, which repairs were being made in order that it might continue to perform that service economically and well, it then being actually destined to return to that exclusive character of service. The purpose of his efforts was therefore clearly interstate.

Upon page 45 of their brief, petitioners refer to section 67 (c) of the California Workmen's Compensation Act (chapter 586, Cal. Stats.

1917). But with respect thereto it need only be said that while the findings of the Industrial Accident Commission are ordinarily conclusive under the provisions of the section quoted, this does not apply in a case where jurisdictional questions turn upon the facts presented by the evidence. This apparently is admitted by the petitioners. See the Brizzolara case, *supra*; S. P. Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916 E. 916, and Smith v. Ind. Acc. Com., 26 Cal. App. 560, 147 Pac. 600.

The language used by this court in its opinion in the case of Pedersen v. D. L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, is pertinent to the matter now before this court. We refer to the following language:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. *Tracks and bridges* are as indispensable to interstate commerce by railroad as are *engines and cars*, and sound economic reasons unite with settled rules of law in *demanding that all of these instrumentalities be kept in repair*. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before

us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its *cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment*' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping *such instrumentalities* in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (Citing cases.) Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." (The italics are ours.)

Thus have we, in answer to the first subdivision of petitioners' argument, pointed out the clear line of distinction between the instant case and the cases upon which petitioners have mainly relied; and, secondly, in answer to the second subdivision of their argument, we have

referred to the enunciations of this court already made in the Parker, Szary and Pedersen cases, no attempt being made to review in this brief all the decisions more or less intimately relating to the present question. If the rule in fact were as broad as petitioners contend, that any employee injured while working upon an engine, regardless of the character of its service, withdrawn from service for repairs was not within the provisions of the Federal Employers Liability Act, how easy would it have been for this court in its opinion in the Winters case, for example, so to have stated. Such obviously is not the law.

In answer to the third subdivision of petitioners' argument, it need only be said that, notwithstanding whatever desirability there may be for an easily applicable rule for the determination of jurisdictional questions in cases involving injuries sustained by railroad shopmen while working upon rolling stock, jurisdictional questions turn upon the facts of the particular case, and, as stated in the case of *Shanks v. D. L. & W. R. R. Co.*, 239 U. S. 556, the test is whether the employee at the time he received the injury was engaged in interstate commerce or in work so closely connected therewith as practically to form a part thereof. Could this court lay down a rule of thumb method for the determination of what cases come within the

provisions of the Federal Employers Liability Act and what are governed by the various Workman's Compensation Acts of the states, it would undoubtedly relieve the courts of some effort. But the cases already decided by this court, which need not be referred to at length in this brief, have drawn the line with such certainty as to render comparatively simple the determination of jurisdictional questions. It is true that locomotives and cars ordinarily when being worked upon are not marked to show the character of service in which they have been engaged, nor the character of the service to which destined. These facts can only be brought out upon some investigation. If, as in the instant case, an engine or car has been devoted exclusively to interstate work prior to its shop repairs, and is destined while being shopped to return to the same character of work, and actually does so return, undoubtedly any workman injured while working thereon, whether he knows those facts or not, is entitled to the benefits conferred by the Federal Employers Liability Act.

Under the fourth subdivision of their argument, the petitioners refer to the case of *Raymond v. C. M. & St. P. R. R. Co.*, 243 U. S. 43. In that case it appeared that a workman had been injured while engaged in the construction

of a tunnel for a new line of railway not yet put into use in the transportation of commerce, and it was held that this being new construction, the Federal act did not apply. In the present case, the locomotive in question was in the repair shop for some two months and while being overhauled some new superheating equipment was added. Petitioners urge the application of the rule of the Raymond case just cited to the facts of the present, a repair case, but in respect thereto it need only be stated that when any engine is shopped, or any other equipment is given an overhauling, certain new parts are required; but to hold this the *ratio decidendi* would be extreme indeed, and not, we submit, legally sound.

In the Pedersen case, *supra*, the injured party was at the time of the receipt of his injury carrying bolts for use in the repair of a bridge used in interstate commerce. Presumably those bolts had not theretofore been used in the bridge or any other instrumentality of interstate commerce. The basis of that decision, however, was that Pedersen was engaged in the repair of an instrumentality of interstate commerce. Whether the bolts had ever been used before had no significance. As stated, the purpose is controlling and the character of the work interstate.

Under the decision in the Raymond case, it might be held that the construction of a new locomotive not yet devoted to the hauling of any commerce had no interstate characteristics, and that a person injured in such construction work would not come within the provisions of the Federal Employers Liability Act; but where, as in our present case, the locomotive had for a considerable period of time been devoted exclusively to interstate commerce within the provisions of the Federal Employers Liability Act, where it was given a general overhauling that it might continue in that service, and as a part of such overhauling certain new parts were installed, was actually destined while in the repair shop to return to its interstate work and was in fact returned thereto, we confidently assert that if O. J. Burton, one of the petitioners in this case, injured while working upon that locomotive, has any rights against respondent, they are under the provisions of the Federal Employers Liability Act.

In conclusion, therefore, respondent respectfully submits that the decision, to review which a writ of *certiorari* directed to the District Court of Appeal of the state of California, Second Appellate District, Division Two, is sought, is sound and right; and that the petition for

said writ of *certiorari* herein filed should therefore be denied.

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Attorneys for Respondent.

Opinion of the District Court of Appeal.

November 26, 1920.

In the District Court of Appeal of the state of California, Second Appellate District, Division Two. Civil No. 3296.

John Barton Payne, as agent under section 206, subdivision (b) of the Transportation Act, 1920 (substituted for Walker D. Hines), petitioner, v. Industrial Accident Commission of the State of California, and O. J. Burton, respondents.

Application for *certiorari* to review an order of the Industrial Accident Commission awarding compensation for injuries. Award *annulled*.

ON PETITION FOR WRIT OF REVIEW.

For petitioner—Fred E. Pettit, Jr., E. E. Bennett.

For respondents—A. E. Graupner; Warren H. Pillsbury, of counsel.

This proceeding was brought to review the action of the Industrial Accident Commission of California in awarding compensation to one O. J. Burton for injuries sustained by him in the line of his employment under Walker D. Hines, director general of railroads, operating the Los Angeles and Salt Lake railroad.

On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the

railroad. On the 19th of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of "breaking in" after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.

The sole question presented for our consideration is: Was the engine, at the time of the accident, engaged in interstate commerce, within the meaning of the Federal Employer's Liability Act (35 U. S. Stats., 65)?

The answer to this simple proposition is rendered difficult by the apparent conflict of decisions of the various courts, federal and state, which have been called upon to apply the law to the facts in issue in particular cases. It is complicated by reason of the fact that no fixed rule has been established by the Supreme Court of the United States for the application of the statute. It was held that each case must be decided in the light of the particular facts with a view to determining whether, at the time of the injury, the employer is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof. (*New York C. & H. R. Co. v. Carr*, 238 U. S. 260.) Where the employer is engaged in both intrastate and interstate commerce, and the instrumentalities are used indiscriminately in both, the line of demarkation between the two classes of business is exceedingly difficult to trace. A resume of some of the decisions will serve to illustrate this point.

In *Louisville & Nashville R. Co. v. Parker*, 242 U. S. 13, the employee was engaged in switching a car not moving in interstate commerce from one track to another, for the purpose of reaching and moving an interstate car; and it was held that he was engaged in interstate commerce. The court says: "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, and doing the act for the purpose of furthering the later work."

New York C. R. Co. v. Carr, *supra*, was a case where two cars carrying interstate freight were uncoupled from an interstate train and backed into a siding, where the employee was injured. We quote from the decision: "The matter is not to be decided by considering the

physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefit of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

In the case of *Erie R. Co. v. Winfield*, 244 U. S. 170, an employee was in charge of a switch engine which was used in switching cars about in the yard, especially to and from a transfer station, some cars containing interstate freight, other intrastate, and still others carrying both classes. After completing his day's work, he put his engine away and started to leave the yard. While crossing a track on his way out, he was struck by an engine and killed. It was held that, as his work was particularly interstate, and his leaving the yard was a necessary incident to his employment, he was at the time engaged in interstate commerce within the purview of the federal act.

New York C. R. Co. v. Porter, 249 U. S. 168, determined that a workman engaged in removing snow from tracks used for the transportation of interstate and intrastate commerce was entitled to compensation under the federal law.

In *Philadelphia B. & W. R. Co. v. Smith*, 250 U. S. 101, the employee was the cook of a construction crew which was employed in repairing bridges at different places along the line. The court stated that as he was actually assisting the bridge carpenters by keep their bed and board close to their place of work, he was engaged in interstate commerce.

Pederson v. Delaware L. & W. R. Co., 229 U. S. 146, decided that an employee who was

carrying bolts to be used in repairing an interstate railroad, and was injured by an interstate train while performing that duty, was within the terms of the federal statute.

Shanks v. Delaware L. & W. R. Co., 239 U. S. 556, enunciates the principle that a workman employed in removing and installing fixtures in a machine shop which is conducted for repairing locomotives used in both interstate and intrastate transportation is not entitled to the benefit of the federal act. The court in its opinion says: "The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation."

In the case of *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, the workman was employed with a crew in switching cars of coal to sheds, where it was placed in chutes, thence to be used to supply coal to engines engaged in both classes of transportation. The court held that he was not in interstate commerce, stating that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

The above citations will suffice to indicate the subtle distinctions which have been drawn by the Supreme Court of the United States in interpreting and applying the Federal Employer's Liability Act.

Coming now to the decisions of our own Supreme Court construing these authorities, we encounter a direct conflict which adds to the difficulty of reaching a satisfactory solution of the problem.

In the case of *Southern Pacific Co. v. Pillsbury*, 170 Cal. 782, the Industrial Accident Commission of California had assumed jurisdic-

tion, under substantially the following facts: A workman named Ruth was repairing a switch engine which had been withdrawn from service in the yard at Roseville Junction, California, where some seventy per cent of the switching was interstate commerce work. While thus engaged, Ruth received injuries resulting in his death. The accident occurred during the time the engine was in the roundhouse undergoing repairs, and three days before it was restored to service. Our Supreme Court annulled the award, after discussing the decisions of the federal courts, some of which we have cited. On May 21, 1917, without filing an opinion, the Supreme Court of the United States denied a petition for a writ of *certiorari* whereby it was sought to review the decision of the state court.

On January 8, 1917, the Supreme Court of the United States rendered an opinion in the case of *Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, from which we quote: "The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both interstate and intrastate commerce, and it was so used after plaintiff's injury.' The last time before the injury was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to any kind of traffic, and it does not appear that *this engine was destined especially to anything more definite than such business as it might be needed for*. It was not interrupted in an interstate haul to be repaired

and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as appears, might be interstate or confined to Iowa*, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depends upon its employment at the time, and not upon *remote probabilities* or upon *accidental later events.*" (Italics ours.)

On the authority of this Winters case, our Supreme Court, in *Hines v. Industrial Acct. Com.*, 60 Cal. Dec. 365, filed October 4, 1920, affirmed an award to one Brizzolara, under circumstances somewhat similar to those in the Ruth case, *supra*. The finding of the commission in the Brizzolara case was as follows: "That at the time of said injury and death said employee was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That when in service, said switch engine was used in both interstate and intrastate traffic. That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent of the whole." After quoting from the decisions of the United States Supreme Court, the opinion proceeds to state that the ruling in the Ruth case is at variance with the holding in the Winters case, and that the Ruth case, therefore, cannot be considered as controlling, notwithstanding that the Ruth case was affirmed by the United States Supreme Court some four months after the Winters case was decided.

Some of the other adjudications of our Supreme Court are illuminating upon this intricate problem. It has been held that a watchman at a railroad crossing used for both interstate and intrastate traffic is engaged in interstate business while employed in keeping the track clear

of obstructions in order to facilitate the passage of interstate trains. (*Southern Pacific Co. v. Industrial Acc. Com.* [Rolfe case], 174 Cal. 8; *Southern Pacific Co. v. Industrial Acc. Com.* [Smith case], 174 Cal. 16.) An electric line-man employed in the removal of an overhead telephone wire which had fallen on the trolley wire used by a railroad for furnishing electric power for the operation of cars of the railroad's interstate and intrastate passenger system, was engaged in interstate commerce, as he was then engaged directly in removing an obstruction to the operation of an instrumentality in actual use for purposes of such commerce. (*Southern Pacific Co. v. Industrial Acc. Com.* [Covell case], 174 Cal. 19.)

In the case of *Southern Pacific Co. v. Industrial Acc. Com.*, 178 Cal. 20, one Butler was killed by an electric shock received while he was wiping insulators on the main power line of an interstate and intrastate system, between the power house and substations. The electric energy was generated at this power house and conveyed in an alternating current of high voltage to the substations, there converted and transformed to a direct current of reduced voltage, thence passed to the trolley wires, and from there to the motors on the cars. Our Supreme Court applied the principle of the Harrington case, *supra*, and decided that the work being done by Butler was analogous to the situation of an employee loading coal chutes for the supply of interstate engines, and held that Butler's employment was too remote from interstate commerce to bring him within the federal statute. This action was reversed by the Supreme Court of the United States (40 Sup. Ct. Rep. 130), the court saying: "Generally, when applicability of the Federal Employer's Liability Act is uncertain, the character of the employ-

ment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it."

The cases which most closely parallel the one we have under consideration are found in the decisions of the Circuit Courts of Appeals; and though they are not expressions of the court of last resort, nevertheless they may guide the action of the state courts in determining the applicability of the federal statute.

Law v. Illinois Cent. R. Co., 208 Fed. 869, was decided by the Circuit Court of Appeals of the Sixth Circuit. A boilermaker's helper was injured in the shops of the railroad company at Memphis, Tenn., while assisting the boilermaker in repairing a freight engine regularly used in interstate commerce. The engine was in the shop for what is called "roundhouse overhauling," and had been dismantled at least twenty-one days before the accident. Up to the time it was taken to the shop it had been regularly used in interstate commerce, was destined to return thereto on completion of the repairs, and did so return the day following the accident. In the opinion holding the federal act applicable to the facts, the court propounds the

following pertinent interrogatories: "Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in the roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character?" Further quoting from the opinion: "As held in the Pederson case, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in proper state of repair while thus used is so clearly related to such commerce as to be in practice and in legal contemplation a part of it."

In *Northern Pacific R. Co. v. Maerkl*, 198 Fed. 1, the Circuit Court of Appeals of the Ninth Circuit held that an employee engaged at the railway shops in making repairs upon a refrigerator car theretofore used indiscriminately in intrastate and interstate commerce, and intended again to be so used when repaired, was one of the instruments of interstate commerce.

Some general statements in the opinion in the Brizzolara case, *supra*, might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra*, upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch

engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence. It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, *supra*, "the purpose controls, and the business is interstate." Its future use was not dependent upon "remote probabilities or accidental later events," but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled.

WELLER, J.

We concur:

FINLAYSON, P. J.

THOMAS, J.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1920.

Industrial Accident Commission of the
State of California and O. J. Burton,

Petitioners,

vs.

John Barton Payne, as Agent Under
Section 206, Transportation Act,
1920 (Los Angeles & Salt Lake
Railroad Company),

Respondent.

PROOF OF SERVICE.

State of California, County of Los Angeles—ss.

Francis J. Mieding, being first duly sworn,
deposes and says:

That he is a clerk in the office of A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett, three of the attorneys of record for the respondent herein, and that they and affiant have their office and place of business at 504 Pacific Electric Bldg., Los Angeles, California; that the other attorneys whose names are subscribed to the foregoing brief in answer to petition for

writ of *certiorari*, have their office and place of business at 1512 H street, Wilkins Building, Washington, D. C.; that Warren H. Pillsbury, the attorney for petitioners in the above entitled proceeding, is a member of the legal staff of the Industrial Accident Commission of the state of California, and has his office at the office of said commission, 525 Market street, San Francisco, California; that there are United States post offices in both the city of Los Angeles and the city of San Francisco, with regular daily communication by mail between said cities; that on the 24th day of February, 1921, affiant served the foregoing brief in answer to petition for writ of *certiorari* upon said Warren H. Pillsbury, by depositing on said date, in the United States Post office at Los Angeles, California, properly enclosed in a sealed envelope, three true and correct copies of the said foregoing brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Mr. Warren H. Pillsbury, c/o Industrial Accident Commission of the state of California, 525 Market street, San Francisco, California."

FRANCIS J. MIEDING.

Subscribed and sworn to before me this 24th, day of February, 1921.

(Seal)

ELIZABETH E. HELLYER,

Notary Public in and for the County of Los Angeles, State of California.

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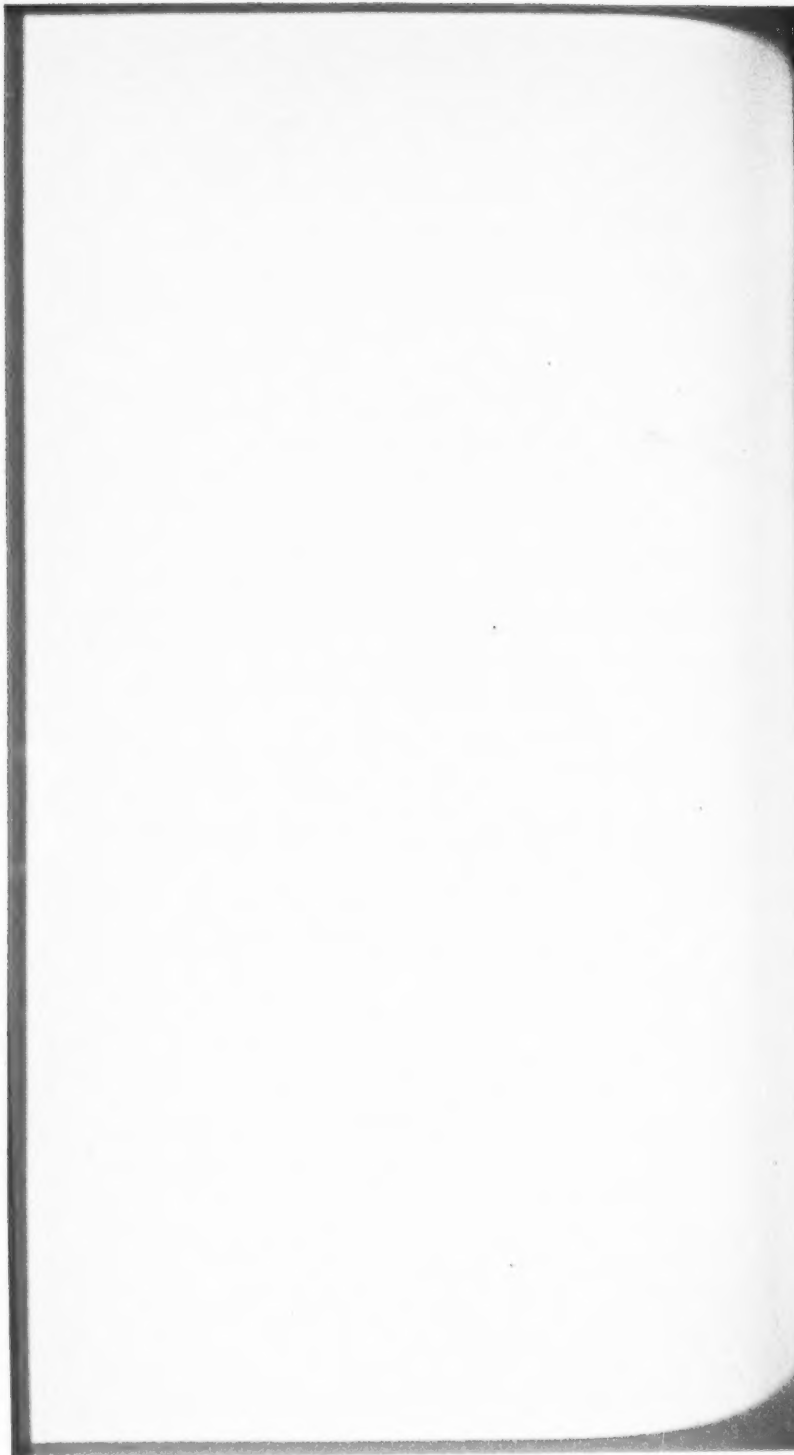


TABLE OF CONTENTS FOR BRIEF IN SUPPORT OF PETITION.

1. STATEMENT OF PETITIONERS' POSITION AND CONTENTIONS.

Petitioners claim that this case is governed by the decisions of this court in *Minneapolis and St. L. R. Co. vs. Winters*, 242 U. S. 353, and *B. and O. R. Co. vs. Branson*, 242, U. S. 623, and by the decision of the Supreme Court of California in *Payne vs. Industrial Accident Commission (BRIZZOLARA)*, ----Cal.----, 192 Pac. 859, in which a petition for *certiorari* filed by counsel for the railroad was denied by this court on January 17 of this year----- 27

2. ARGUMENT.

I. WHERE A LOCOMOTIVE, WITHOUT REGARD TO THE NATURE OF ITS SERVICE WHILE IN USE, IS WITHDRAWN FROM SERVICE FOR EXTENDED REPAIRS, SO THAT IT IS WHOLLY OUT OF SERVICE AND COMMISSION AND NOT ASSISTING IN THE MOVEMENT OF ANY KIND OF COMMERCE AT THE TIME OF SUCH REPAIRS, AN INJURY SUSTAINED BY A REPAIR SHOP WORKMAN WHILE REPAIRING SUCH LOCOMOTIVE, DOES NOT FALL WITHIN THE PROVISIONS OF THE FEDERAL ACT. *MINNEAPOLIS AND ST. L. R. CO. VS. WINTERS*, 242 U. S. 353; *B. AND O. R. CO. VS. BRANSON*, 242 U. S. 623; *PAYNE VS. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA (BRIZZOLARA)*, ----CAL.----, 192 PAC. 859, *CERTIORARI DENIED BY THIS COURT JANUARY 17, 1921*----- 30

II. AT THE LEAST, THE *WINTERS*, *BRANSON* AND *BRIZZOLARA* CASES, *SUPRA*, STAND FOR THE PROPOSITION THAT THE MAKING OF REPAIRS TO AN ENGINE, ENGAGED WHILE IN SERVICE IN BOTH INTERSTATE AND INTRASTATE COMMERCE, SUCH REPAIRS BEING MADE WHILE THE ENGINE IS OUT OF COMMISSION AND NOT ENGAGED IN ANY KIND OF COMMERCE, IS NOT WITHIN THE FEDERAL ACT. IT IS OUR CONTENTION THAT THE PRESENT CASE IS SQUARELY WITHIN THIS RULE ----- 43

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

No. -----

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, AS AGENT
UNDER SECTION 206, TRANSPORTATION ACT,
1920 (LOS ANGELES AND SALT LAKE RAILWAY COMPANY),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Industrial Accident Commission of the State of California, and O. J. Burton, respectfully pray for a writ of *certiorari* to the District Court of Appeal of the State of California, Second Appellate District, Division Two, to require that there be certified to this court for review and determination, a final judgment rendered by said District Court of Appeal, in a case entitled *John Barton*

Payne, as agent under section 206, Transportation Act (Los Angeles and Salt Lake Railway Company) vs. Industrial Accident Commission of the State of California and O. J. Burton, Civ. No. 3296, wherein there was drawn into question an authority exercised under the State of California on the ground of its being repugnant to the constitution and laws of the United States, and the decision therein was against the validity of said authority, and wherein there was claimed a right, privilege and immunity under an act of Congress, known as the Federal Employers' Liability Act of April 22, 1908, chapter 149, 35 Stat. 65 (amended in respects, not material here, on April 5, 1915), and the decision was in favor of such right, privilege and immunity.

This application is made under the provisions of section 237 of the Judicial Code, as amended September 6, 1916, chapter 448, 39 Stat. 726. The opinion of said District Court of Appeal of the State of California is not yet printed in the Pacific Reporter or in the official California Reports. A copy is set forth in the certified record, filed herein, and also is reprinted under this cover for the convenience of the court.

With this petition for *certiorari* we file a certified copy of the transcript of record in this case, which includes all proceedings in the District Court of Appeal of California.

In this petition we shall refer to the pages of the certified record as paged by the Clerk of the District Court of Appeal of California.

I.

BRIEF STATEMENT OF THE MATTER.

This case was originally that of a claim filed with the Industrial Accident Commission of California under the Workmen's Compensation, Insurance and Safety Act of 1917 of the State of California (chapter 586, California Statutes, 1917, as amended by chapter 471, California Laws, 1919), for an injury sustained by petitioner O. J. Burton, while employed as a machinist in the general shops of the Los Angeles and Salt Lake Railway Company, at Los Angeles, California. Said railroad was at said time under federal management, the original defendant herein being Walker D. Hines, Director General of Railroads, United States Railroad Administration. Subsequently, John Barton Payne, as agent under section 206, Transportation Act of 1920, was substituted by stipulation for Walker D. Hines. The principal defense before the Industrial Accident Commission was that this case fell within the provisions of the Federal Employers' Liability Act. The Industrial Accident Commission entered its award in favor of O. J. Burton upon the ground that the state workmen's compensation act was applicable, the injury not being within the federal act.

Under the California statutes, decisions of the California Industrial Accident Commission may be reviewed only by writ of *certiorari*, denominated in said statutes a writ of review. Such proceedings in *certiorari* or review can be instituted only in the

District Court of Appeal or in the Supreme Court of California. Proceedings in *certiorari* or review were instituted in this case within the proper time and in the proper manner by the Director General of Railroads, in the District Court of Appeal of California, Second Appellate District, Division Two. At the termination of such proceedings, said court entered its judgment annulling the award of the Industrial Accident Commission upon the ground that the claim was within the federal act. This judgment is the decision here sought to be reviewed by this court. A petition for rehearing was filed with the District Court of Appeal and denied by it. A petition for hearing in the Supreme Court of California, after final decision by the District Court of Appeal, was filed and denied by a vote of four to three, of the members of said Supreme Court.

II.

STATEMENT OF THE FACTS.

The facts relevant to the determination of the jurisdictional question are not controverted, although conflicting conclusions have been drawn below. The facts themselves are stated as follows:

At the time of Burton's injury, Walker D. Hines, as Director General of Railroads, United States Railroad Administration, was engaged as a common carrier in operating the railroad properties of the Los Angeles and Salt Lake Railway Company in the states of California, Nevada and Utah. Such properties included the general railroad shops at Los Angeles, where the injury occurred. Such railroad properties, tracks and lines were devoted to the handling of both interstate and intrastate traffic. On February 1, 1919, said Burton was injured while repairing engine No. 3673 in said general shops.

This locomotive had been used for several months before being sent to the repair shop, for the purpose of hauling through freight trains across the division to which it was assigned, the western terminus of the division being in California and the eastern terminus in Nevada. It may also have hauled local and intrastate freight, at times, in the same division. On the nineteenth of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure. It was the intention to return it to the same service upon the completion of the

repairs. This repair work was not completed until shortly before February 25, 1919, when the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles, California, to San Pedro, California, and on the following day returned to Los Angeles with a similar train, a portion of the train in each instance being interstate and other portions being intrastate. This trip to San Pedro was a part of the process of "breaking in" after the locomotive had undergone extensive repairs. After this run to San Pedro, the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run, where it has been used ever since.

The only question presented before the District Court of Appeal of California, and the only question here raised, is whether there was such an employment of Burton in interstate commerce at the time of his injury, as to remove the case from the jurisdiction of the Industrial Accident Commission and the protection of the California Workmen's Compensation, Insurance and Safety Act of 1917, and remit the claimant to the Federal Employers' Liability Act for his sole relief.

The record is free from dispute as to the facts. The legal conclusions to be drawn from those facts is all that was before the District Court of Appeal of California or that is involved in this petition for *certiorari*.

III.

Petitioner, Industrial Accident Commission was created, and now exists, under and by virtue of the Workmen's Compensation, Insurance and Safety Act of the State of California, approved May 26, 1913 (chapter 176, California Statutes 1913). Such Commission is empowered, among other duties, to determine all controversies arising between employers and their employees under the said Workmen's Compensation, Insurance and Safety Act, together with all later amendments, reenactments or supplementary workmen's compensation legislation. Said Commission is further vested by the said statute, with power and authority to appear by its own counsel in all proceedings in review of its decisions or affecting its jurisdiction

IV.

On the third day of July, 1919, said O. J. Burton filed with said Industrial Accident Commission of the State of California, a written application for adjustment of claim under the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, of California (chapter 586, California Laws 1917). On the eleventh day of July, 1919, said Walker D. Hines, as Director General of Railroads, United States Railroad Administration, filed his answer in said proceeding, claiming among other things, that said injury fell within the scope of the Federal Employers' Liability Act, and therefore, was without the jurisdic-

tion of said Commission. A hearing was had and testimony taken by said Commission on July 22, 1919. On December 17, 1919, said Industrial Accident Commission entered its findings and award awarding said O. J. Burton compensation benefits against said Walker D. Hines under said California statute. On January 2, 1920, said Walker D. Hines petitioned said Industrial Accident Commission for a rehearing, which petition was denied on January 22, 1920. On February 20, 1920, said Walker D. Hines filed his petition with the District Court of Appeal of the State of California, Second Appellate District, Division Two, for a writ of *certiorari* or review, to inquire into the lawfulness of said award of the Industrial Accident Commission of the State of California. Said Court granted a writ of *certiorari* or review on February 26, 1920. Thereafter proceedings were had before said court, briefs filed, and the matter submitted for decision.

On June 22, 1920, respondent John Barton Payne, as Agent under section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Co.), was substituted, upon stipulation, by order of said District Court of Appeal, as petitioner in said proceeding then pending before it, in the place of said Walker D. Hines, Director General of Railroads, United States Railroad Administration.

On November 26, 1920, said court entered its order and judgment annulling the award of said Industrial Accident Commission upon the ground that the injury sustained by O. J. Burton came within the

provisions of the Federal Employers' Liability Act and hence was not subject to the provisions of the California Workmen's Compensation Act. On December 16, 1920, a petition for rehearing was filed by said Industrial Accident Commission with said District Court of Appeal, which was denied on December 24, 1920. On January 3, 1921, a petition for hearing in the Supreme Court of California after final decision by the District Court of Appeal, was filed by counsel for the Industrial Accident Commission and denied by said court by a four to three vote on January 24, 1921.

V.

The District Court of Appeal of the State of California is created by Article VI of the constitution of the State of California, next to the highest court of California, and has original jurisdiction to issue writs of *certiorari* or review. No appeal lies from the District Court of Appeal to the Supreme Court, but the Supreme Court may order any matter pending before a District Court of Appeal to be transferred to it for hearing and decision, before decision of the District Court of Appeal, or within thirty days after the decision of the District Court of Appeal becomes final. Petitioners applied for the Supreme Court of California for such hearing and determination of this proceeding after the decision of the District Court of Appeal had become final, and within the time provided by law for such petition, and said petition was

denied by the Supreme Court by a vote of four to three, without opinion. Petitioners have had at no time any other recourse to the Supreme Court of California than said petition for hearing, and have had no hearing before the Supreme Court of the State upon this matter. That therefore the decision of the District Court of Appeal constitutes a decision of the highest court in which decision could be had. (See *Terry vs. Southern Pacific Co.*, 176 Cal. 584, 169 Pac. 354, dismissed in 249 U. S. 592) where it was held that said District Court of Appeal was the highest court in which decision could be had, in a case similar to the present.)

VI.

That said District Court of Appeal by its final judgment in this proceeding, erred in determining and holding that petitioner O. J. Burton was employed and engaged in interstate commerce at the time of his injury, and erred in holding that the California Workmen's Compensation, Insurance and Safety Act of 1917 was divested of application in the premises by reason of the claim that said Burton was remitted to the provisions of the Federal Employers' Liability Act, and erred in annulling the award of the Industrial Accident Commission of the State of California upon said ground.

VII.

**REASONS WHY IT IS RESPECTFULLY SUBMITTED
THAT CERTIORARI SHOULD BE GRANTED.**

1. The decision of the District Court of Appeal is opposed to the decisions of this court in *Minneapolis & St. L. R. Co. vs. Winters*, 242 U. S. 353, and *B. & O. R. Co. vs. Branson*, 242 U. S. 623, reversing same title, 128 Maryland 678, 98 Atl. 225, and is also opposed to the recent decision of the Supreme Court of California in *John Barton Payne vs. Industrial Accident Commission of the State of California* (Brizzolara) Cal., 192 Pac. 859, in which a petition for *certiorari* was denied by this court on January 17, 1921.

2. The employee in the present case was injured while making repairs in a repair shop upon a road engine which had been withdrawn from service for several months for extensive repairs and alterations, and for the installation of certain new equipment. A locomotive, regardless of the character of its service while in use, is not an instrumentality of interstate commerce while out of service and commission for extended repairs or alterations, and such repairs do not come under the Federal Employers' Liability Act.

3. The employee in the present case was injured while repairing a locomotive, which, we claim, was used while in prior service both for interstate and intrastate commerce (see supporting brief, pp. 43-52), and at the time of the repairs was out of service and commission for an extended period. Repairs to such engine in a repair shop undoubtedly are gov-

erned by the state law under the authorities cited in paragraph 1, above.

4. At the time of the injury, Burton was engaged in extensive overhauling of such engine, including the installation of a superheating system, which makes the case analogous to one of rebuilding or new construction of railroad equipment, which is held by this court in *Raymond vs. C. M. & St. P. R. Co.*, 243 U. S. 43, to be governed by the state law.

VIII.

Your petitioner is advised, and he believes, that said judgment of the District Court of Appeal of the State of California in said case, is erroneous for the reasons above stated, and that this honorable court should require the said case to be certified to it for its review and determination in conformity with the provisions of section 237 of the Judicial Code of the United States, as amended by an act of September 8, 1916 (chapter 448, 39 Stat. 726).

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the District Court of Appeal of the State of California, Second Appellate District, Division Two, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said District Court of Appeal in the said case, entitled, *John Barton Payne, as Agent under Section 206, Transportation Act, 1920, vs. Industrial Accident Commission of the State of California and O. J. Burton*, Civ. No.

3296, to the end that the said case may be reviewed and determined by this court as provided by section 237, as amended by the Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate, and in conformity with said provision of the Judicial Code, and that said judgment of the said District Court of Appeal in the said case, and every part thereof, may be reversed by this honorable court, and that petitioners may recover their costs.

WARREN H. PILLSBURY,
Attorney for Petitioners.

State of California,
City and County of San Francisco. } ss.

Warren H. Pillsbury, being first duly sworn, deposes and says:

That I am an attorney and counselor of the Supreme Court of the United States. I am the attorney for the petitioners named in the foregoing petition for a writ of *certiorari*. The allegations of said petition are true as I verily believe. The points raised herein are, in my opinion, meritorious. Said petition is not filed for the purpose of delay.

(Signed) WARREN H. PILLSBURY.

Subscribed and sworn to before me this fifth day of February, 1921.

(SEAL)

C. B. SESSIONS,
Notary Public in and for
the City and County of
San Francisco, State of
California.

JUDGMENT TO BE REVIEWED AND OPINION THEREON.

CIVIL No. 3296.

SECOND APPELLATE DISTRICT

DIVISION TWO.

NOVEMBER 26, 1920.

JOHN BARTON PAYNE, as Agent under Section 206, Subdivision (b) of the Transportation Act, 1920 (substituted for Walker D. Hines), *Petitioner*, vs. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, and O. J. BURTON, *Respondents*.

[1] WORKMEN'S COMPENSATION ACT—INJURY TO WORKMAN IN RAILROAD REPAIR SHOPS—ENGINE ENGAGED IN INTERSTATE COMMERCE—LACK OF JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION—An employee engaged in repairing an engine in the general shops of the railroad company in this state, which engine had been used several months exclusively in interstate commerce, and which had been placed in the shops for general overhauling, whereupon it was the intention to return it to its regular service, and which was in fact so returned, is engaged in work so intimately connected with interstate commerce as practically to be a part of it, and the Industrial Accident Commission has no jurisdiction to make an award of compensation for injuries to such employee received while tapping the boiler of the engine.

**APPLICATION FOR CERTIORARI TO REVIEW AN ORDER OF THE
INDUSTRIAL ACCIDENT COMMISSION AWARDING COMPEN-
SATION FOR INJURIES. AWARD ANNULLED.**

ON PETITION FOR WRIT OF REVIEW.

For Petitioner—Fred E. Pettit, Jr., E. E. Bennett.

For Respondents—A. E. Graupner; Warren H. Pillsbury, of Counsel.

This proceeding was brought to review the action of the Industrial Accident Commission of California in awarding compensation to one O. J. Burton for injuries sustained by him in the line of his employment under Walker D. Hines, director general of railroads, operating the Los Angeles and Salt Lake railroad.

On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad. On the nineteenth of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919,

but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of "breaking in" after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.

The sole question presented for our consideration is: Was the engine, at the time of the accident, engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act (35 U. S. Stats., 65) ?

The answer to this simple proposition is rendered difficult by the apparent conflict of decisions of the various courts, federal and state, which have been called upon to apply the law to the facts in issue in particular cases. It is complicated by reason of the

fact that no fixed rule has been established by the Supreme Court of the United States for the application of the statute. It has held that each case must be decided in the light of the particular facts with a view to determining whether, at the time of the injury, the employer is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof. (*New York C. & H. R. Co. vs. Carr*, 238 U. S. 260.) Where the employer is engaged in both intrastate and interstate commerce, and the instrumentalities are used indiscriminately in both, the line of demarkation between the two classes of business is exceedingly difficult to trace. A resume of some of the decisions will serve to illustrate this point.

In *Louisville & Nashville R. Co. vs. Parker*, 242 U. S. 13, the employee was engaged in switching a car not moving in interstate commerce from one track to another, for the purpose of reaching and moving an interstate car; and it was held that he was engaged in interstate commerce. The court says: "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, and doing the act for the purpose of furthering the later work."

New York C. R. Co. vs. Carr, *supra*, was a case where two cars carrying interstate freight were uncoupled from an interstate train and backed into a siding, where the employee was injured. We quote from the decision: "The matter is not to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an

engine for an interstate trip, he is entitled to the benefit of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

In the case of *Erie R. Co. vs. Winfield*, 244 U. S. 170, an employee was in charge of a switch engine which was used in switching cars about in the yard, especially to and from a transfer station, some cars containing interstate freight, others intrastate, and still others carrying both classes. After completing his day's work, he put his engine away and started to leave the yard. While crossing a track on his way out, he was struck by an engine and killed. It was held that, as his work was particularly interstate, and his leaving the yard was a necessary incident to his employment, he was at the time engaged in interstate commerce within the purview of the federal act.

New York C. R. Co. vs. Porter, 249 U. S. 168, determined that a workman engaged in removing snow from tracks used for the transportation of interstate and intrastate commerce was entitled to compensation under the federal law.

In *Philadelphia B. & W. R. Co. vs. Smith*, 250 U. S. 101, the employee was the cook of a construction crew which was employed in repairing bridges at different places along the line. The court stated that as he was actually assisting the bridge carpenters by keeping their bed and board close to their place of work, he was engaged in interstate commerce.

Pederson vs. Delaware L. & W. R. Co., 229 U. S. 146, decided that an employee who was carrying bolts to be used in repairing an interstate railroad, and was injured by an interstate train while performing that duty, was within the terms of the federal statute.

Shanks vs. Delaware L. & W. R. Co., 239 U. S. 556, enunciates the principle that a workman employed in removing and installing fixtures in a machine shop which is conducted for repairing locomotives used in both interstate and intrastate transportation is not entitled to the benefit of the federal act. The court in its opinion says: "The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation."

In the case of *Chicago, B. & Q. R. Co. vs. Harrington*, 241 U. S. 177, the workman was employed with a crew in switching cars of coal to sheds, where it was placed in chutes, thence to be used to supply coal to engines engaged in both classes of transportation. The court held that he was not in interstate commerce, stating that "manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

The above citations will suffice to indicate the subtle distinctions which have been drawn by the Supreme Court of the United States in interpreting and applying the Federal Employers' Liability Act.

Coming now to the decisions of our own supreme court construing these authorities, we encounter a direct conflict which adds to the difficulty of reaching a satisfactory solution of the problem.

In the case of *Southern Pacific Co. vs. Pillsbury*, 170 Cal. 782, the Industrial Accident Commission of California had assumed jurisdiction, under substantially the following facts: A workman named Ruth was repairing a switch engine which had been withdrawn from service in the yard at Roseville Junction,

California, where some seventy per cent of the switching was interstate commerce work. While thus engaged, Ruth received injuries resulting in his death. The accident occurred during the time the engine was in the roundhouse undergoing repairs, and three days before it was restored to service. Our supreme court annulled the award, after discussing the decisions of the federal courts, some of which we have cited. On May 21, 1917, without filing an opinion, the Supreme Court of the United States denied a petition for a writ of *certiorari* whereby it was sought to review the decision of the state court.

On January 8, 1917, the Supreme Court of the United States rendered an opinion in the case of *Minneapolis & St. Louis R. Co. vs. Winters*, 242 U. S. 353, from which we quote: "The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both interstate and intrastate commerce, and it was so used after plaintiff's injury.' The last time before the injury was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to any kind of traffic, and it does not appear that *this engine was destined especially to anything more definite than such business as it might be* needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. *Its next work, so far as*

appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depends upon its employment at the time, and not upon remote probabilities or upon accidental later events." (Italics ours.)

On the authority of this Winters case, our supreme court, in *Hines vs. Industrial Acc. Com.*, 60 Cal. Dec. 365, filed October 4, 1920, affirmed an award to one Brizzolara, under circumstances somewhat similar to those in the Ruth case, *supra*. The finding of the commission in the Brizzolara case was as follows: "That at the time of said injury and death said employee was engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor. That when in service, said switch engine was used in both interstate and intrastate traffic. That the evidence herein is insufficient to establish as a fact that the proportion of said interstate use exceeded or amounted to thirty per cent of the whole." After quoting from the decisions of the United States Supreme Court, the opinion proceeds to state that the ruling in the Ruth case is at variance with the holding in the Winters case, and that the Ruth case, therefore, can not be considered as controlling, notwithstanding that the Ruth case was affirmed by the United States Supreme Court some four months after the Winters case was decided.

Some of the other adjudications of our supreme court are illuminating upon this intricate problem. It has been held that a watchman at a railroad crossing used for both interstate and intrastate traffic is engaged in interstate business while employed in keeping the track clear of obstructions in order to

facilitate the passage of interstate trains. (*Southern Pacific Co. vs. Industrial Acc. Com.* [Rolfe case], 174 Cal. 8; *Southern Pacific Co. vs. Industrial Acc. Com.* [Smith case], 174 Cal. 16.) An electric lineman employed in the removal of an overhead telephone wire which had fallen on the trolley wire used by a railroad for furnishing electric power for the operation of cars of the railroad's interstate and intrastate passenger system, was engaged in interstate commerce, as he was then engaged directly in removing an obstruction to the operation of an instrumentality in actual use for purposes of such commerce. (*Southern Pacific Co. vs. Industrial Acc. Com.* [Covell case], 174 Cal. 19.)

In the case of *Southern Pacific Co. vs. Industrial Acc. Com.*, 178 Cal. 20, one Butler was killed by an electric shock received while he was wiping insulators on the main power line of an interstate and intrastate system, between the power house and substations. The electrical energy was generated at this power house and conveyed in an alternating current of high voltage to the substations, there converted and transformed to a direct current of reduced voltage, thence passed to the trolley wires, and from there to the motors on the cars. Our supreme court applied the principle of the Harrington case, *supra*, and decided that the work being done by Butler was analogous to the situation of an employee loading coal chutes for the supply of interstate engines, and held that Butler's employment was too remote from interstate commerce to bring him within the federal statute. This action was reversed by the Supreme Court of the United States (40 Sup. Ct. Rep. 130), the court saying: "Generally, when applicability of the Federal Employers' Liability Act is uncertain,

the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it."

The cases which most closely parallel the one we have under consideration are found in the decisions of the circuit courts of appeals; and though they are not expressions of the court of last resort, nevertheless they may guide the action of the state courts in determining the applicability of the federal statute.

Law vs. Illinois Cent. R. Co., 208 Fed. 869, was decided by the circuit court of appeals of the sixth circuit. A boilermaker's helper was injured in the shops of the railroad company at Memphis, Tenn., while assisting the boilermaker in repairing a freight engine regularly used in interstate commerce. The engine was in the shop for what is called "round-house overhauling," and had been dismantled at least twenty-one days before the accident. Up to the time it was taken to the shop it had been regularly used in interstate commerce, was destined to return thereto on completion of the repairs, and did so return the day following the accident. In the opinion holding

the federal act applicable to the facts, the court propounds the following pertinent interrogatories: "Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in the roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character?" Further quoting from the opinion: "As held in the Pederson case, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in proper state of repair while thus used is so clearly related to such commerce as to be in practice and in legal contemplation a part of it."

In *Northern Pacific R. Co. vs. Maerkl*, 198 Fed. 1, the circuit court of appeals of the ninth circuit held that an employee engaged at the railway shops in making repairs upon a refrigerator car theretofore used indiscriminately in intrastate and interstate commerce, and intended again to be so used when repaired, was one of the instruments of interstate commerce.

Some general statements in the opinion in the Brizzolara case, *supra*, might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra*, upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend

upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence. It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was permanently devoted to interstate commerce, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, *supra*, “the purpose controls, and the business is interstate.” Its future use was not dependent upon “remote probabilities or accidental later events,” but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

[1] In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled.

WELLER, J.

We concur:

FINLAYSON, P. J.

THOMAS, J.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No.-----.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, AS AGENT
UNDER SECTION 206, TRANSPORTATION ACT,
1920 (LOS ANGELES AND SALT LAKE RAILWAY COMPANY),

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

This case involves the determination of the respective application of the Federal Employers' Liability Act of April 22, 1908, chapter 149, 35 Stat. 65 (amended in respects not material here on April 5, 1910), or of the Workmen's Compensation Act of California (chapter 586, Cal. Stats. 1917) to an injury sustained by petitioner O. J. Burton on February 1, 1919, at Los Angeles, California, while in the course of his employment in the general repair shops of the Los Angeles and Salt Lake Railway Company.

Application was originally made by Burton under the California Workmen's Compensation Act before the California Industrial Accident Commission. This body applied the California law to the injury. On review by *certiorari* of its decision by the District Court of Appeal of California, Second Appellate District, Division Two, the appellate court annulled the allowance of workmen's compensation benefits upon the ground that the claim was within the Federal Employers' Liability Act. This is the decision here sought to be reviewed by this court.

The facts are stated in detail in the petition for *certiorari*. The evidence is free from dispute, and only the legal conclusions to be drawn from the undisputed facts are in issue. In brief, the claimant below, O. J. Burton, was injured in the general repair shops of the employing railroad while repairing a locomotive which was out of service at the time, and dismantled, undergoing extensive repairs and alterations and the addition of new equipment. The nature of the use of this engine while in service is discussed in the second division following, of this brief.

STATEMENT OF PETITIONERS' POSITION AND CONTENTIONS.

Petitioners claim that this case is governed by the decisions of this court in *Minneapolis & St. L. R. Co. vs. Winters*, 242 U. S. 353, and *B. & O. R. Co. vs. Branson*, 242 U. S. 623, and by the decision of the Supreme Court of California in *Payne vs. Industrial Accident Commission* (Brizzolara) --- Cal. ---, 192

Pac. 859, in which a petition for *certiorari* filed by counsel for the railroad was denied by this court on January 17th of this year.

(a) The foregoing authorities hold, we contend, that where a locomotive, *without regard to the nature of its service while in use*, is withdrawn from service for repairs, so that it is wholly out of service and commission, and not assisting in the movement of any kind of commerce, an injury sustained by men in repair shops in repairing such locomotive does not fall within the provisions of the federal act. The present case is upon its facts, wholly within this rule.

(b) At the least, the foregoing cases undoubtedly hold that where an engine *is engaged in both interstate and intrastate commerce while in service*, and is taken wholly out of service and commission for repairs, so that it is not engaged in any kind of commerce while being so repaired, injuries sustained by men in repair shops in repairing such engine, do not fall within the provisions of the federal act.

The trial court below (Industrial Accident Commission) and the appellate court (District Court of Appeal) have reached opposite results in drawing their conclusions of law upon the undisputed facts, as to whether the engine in the present case was "permanently and exclusively devoted to interstate commerce" while in service, or engaged in both kinds of commerce. If this question be material, we claim that this case, upon the undisputed facts and the findings below, is within the rule here stated.

(c) We urge this court to announce a clear-cut rule for determining jurisdiction in cases of injuries to railroad shopmen, working upon rolling stock withdrawn from service. Railroad shopmen form a distinct group of railroad employees as to jurisdictional requirements, and should be considered, to some extent, with reference to their own necessities and position. Without such clear-cut rule, inferior courts can not, with assurance, determine which law to apply in litigated cases, and much hardship and unnecessary litigation results. We contend that the only practicable test in repair shop cases is that dependent upon whether the engine or car is withdrawn from service, as distinguished from being merely interrupted for repairs during the course of an interstate haul, to go on after the repairs. Any distinction based upon the character of use of the engine or car while in use, is contrary to the purpose of the Federal Employers' Liability Act, and incapable of practical application to injuries sustained by repair shopmen, to whom all rolling stock in the repair shops is alike, as to jurisdiction.

ARGUMENT.

I.

WHERE A LOCOMOTIVE, WITHOUT REGARD TO THE NATURE OF ITS SERVICE WHILE IN USE, IS WITHDRAWN FROM SERVICE FOR EXTENDED REPAIRS, SO THAT IT IS WHOLLY OUT OF SERVICE AND COMMISSION AND NOT ASSISTING IN THE MOVEMENT OF ANY KIND OF COMMERCE AT THE TIME OF SUCH REPAIRS, AN INJURY SUSTAINED BY A REPAIR SHOP WORKMAN WHILE REPAIRING SUCH LOCOMOTIVE, DOES NOT FALL WITHIN THE PROVISIONS OF THE FEDERAL ACT. *MINNEAPOLIS & ST. L. R. O. vs. WINTERS*, 242 U. S. 353; *B. & O. R. CO. vs. BRANSON*, 242 U. S. 623; *PAYNE vs. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA* (BRIZZOLARA), ——— Cal. ———, 192 PAC. 859, *CERTIORARI* DENIED BY THIS COURT JANUARY, 17, 1921.

The facts as set forth in the petition, and as set out in more detail in the next subdivision of this brief, show clearly that the engine upon which Burton was working was, at the time of his injury, withdrawn from service and out of commission. It was in the repair shop from December 19, 1918, to March 4, 1919, except for one short trial trip on February 25 and 26, 1919. The injury occurred on February 1, 1919. From December 19, 1918, to February 25, 1919, the engine moved no commerce, interstate or otherwise, and was not a part of the equipment in use for the movement of interstate or local commerce. If, therefore, the rule stated in the caption is a correct deduction from the three cases mentioned, the decision of the District Court of Appeal was erroneous and should be reversed.

These three cases show, in our belief, that the character of service of a locomotive while in use, is in no sense a part of the test of jurisdiction over injuries occurring while it is out of commission for extended repairs.

In the first case cited, the *Winters* case (*Minneapolis & St. L. R. Co. vs. Winters*, 242 U. S. 353), this court used language, as quoted below, which supports this view. It is true that certain other language used in the opinion also leans toward the opposing view, that the character of use of the locomotive while in service, might be a factor. We are left somewhat in doubt as to which language this court will now follow. As the present case is one of many which will come up hereafter, we urge this court to give a statement of its view for the guidance of lower tribunals in cases like the present.

We quote the following from the *Winters* case, italicizing the portions of the opinion which substantiate our contention:

"The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18th when it pulled a freight train into Marshalltown, and it was used again on October 21st, after the accident, to pull a freight train

out from the same place. That is all that we have, and is not sufficient to bring the case under the act. *This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment, it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events. Judgment affirmed.*" (Italics ours.)

Applying the italicized portions to the present case, the engine here was not "permanently devoted to any kind of traffic." An irrevocable dedication of an engine to a particular kind of traffic can not be, and is not, made. An engine is not like a roadbed in this respect. It is not shown that this engine was of such a type of construction that it could be usable only in interstate commerce. In the absence of such showing, it was physically capable of being shifted from one assignment to another, from through to local freight, or from one division to another, as the exigencies of the business of the road might require.

Similarly, it was not "interrupted in an interstate haul to be repaired and go on."

Similarly, "its next work, so far as appears, might be interstate or confined to one state as it should happen." Its next trip after leaving the repair shop on February 25 was in fact confined to California, during which it hauled two trains containing both interstate and intrastate cars.

Furthermore, "at the moment, it was not engaged in either. Its character as an instrumentality of commerce depended upon this employment *at the time* * * *." "*At the time*" it was in the shop.

The *Winters* case, therefore, wholly governs the present case.

In the second case cited, the *Branson* case (*B. & O. R. Co. vs. Branson*, 242 U. S. 623), reversing same title, 128 Md. 678, 98 Atl. 225, a painter was employed at a railroad roundhouse to paint engines and cars, which were necessarily out of service and commission while being painted. He contracted a metallic poisoning from the paints used, and filed suit for damages under the Federal Employers' Liability Act. The Supreme Court of Maryland, in 128 Md. 678, 98 Atl. 225, held the case to be within the federal act, in that the engines and cars, while in use, were employed in the interstate commerce business of the railroad. This conclusion was reversed by this court in a memorandum opinion, upon the authority of *Del. L. & W. R. R. Co. vs. Yurkonis*, 238 U. S. 439; *C. B. & Q. R. R. Co. vs. Harrington*, 241 U. S. 177; *Shanks vs. Del. L. & W. R. R. Co.*, 239 U. S. 556; and *Minneapolis & St. L. R. Co. vs. Winters*, 242 U. S. 353.

The painting of locomotives in a roundhouse seems undistinguishable, for jurisdictional purposes, from the making of repairs upon the same locomotive when similarly taken out of service.

Not only is the *Branson* case, in point upon its facts, but the authorities cited by this court in its memorandum decision in that case, present an additional ground for reversing the decision below in the present matter. These cases cited are all what may be termed "remoteness cases." Only one case there cited, the *Winters* case, involves repairs to rolling stock. All are cases in which the service performed at the time of the injury was held remote, or too far removed from the interstate business of the railroad, to come under the federal act.

For instance, in the *Yurkonis* case, the mining of coal in a railroad owned mine, the coal to be used subsequently for firing engines engaged in interstate and intrastate commerce, was held remote from the actual transportation of interstate commerce. In the *Harrington* case, the shifting of coal cars containing railroad owned coal, and the unloading of such coal into bunkers from which the coal was to be supplied to engines engaged in moving both kinds of commerce, was held remote from the interstate commerce business of the employer. In the *Shanks* case, the repair of machinery in a railroad shop, which machinery was in turn used in the repair of engines and cars used in interstate commerce business of the railroad, was held remote. And in the *Winters* case, *supra*, cited in the opinion in the *Branson* case, *supra*,

the repair of a road engine used in interstate commerce was held remote.

One of the grounds of the decision of this court in the *Branson* case, *supra*, must therefore have been that the painting of engines and cars used in the interstate commerce business of the railroad, is remote to the actual movement of interstate commerce, such engines or cars being out of service.

Viewed either as a remoteness case or as a repair case, the present case is no closer to the actual movement of commodities in interstate commerce than the cases cited by this court in its memorandum opinion in the *Branson* case, or in the *Branson* and *Winters* cases themselves. Nor did the service rendered by Burton in the present case facilitate to any greater degree the interstate commerce business of the railroad than the service rendered by *Branson* or by *Winters*.

Another test may be applied to determine remoteness to interstate commerce. In *Hudson & M. R. Co. vs. Iorio* (U. S. Circuit Court of Appeal) 239 Fed. 855, a railroad employee was injured while piling rails for storage to stay until needed for track laying. The Circuit Court of Appeal there applied the test of whether interstate commerce was "going on without present assistance from Iorio," in determining whether his service was so closely connected with interstate commerce as to be a part thereof. It was held that his claim did not come under the federal act. Applying the test of the *Iorio* case to the present case, the interstate commerce business of the Los

Angeles & Salt Lake Railway Company was being carried on at the time of Burton's injury "without present assistance from Burton."

Going back to the fundamental basis upon which all of the authorities cited depend, the language of the Federal Employers' Liability Act itself, the same conclusion follows. The federal act, by its express terms, applies only to injuries sustained by an employee of a railroad engaged in interstate commerce, "while he is employed by such carrier in such commerce." This clause has been construed to mean, service in interstate commerce *at the moment of the injury*, *Illinois Central R. Co. vs. Behrens*, 233 U. S. 473. Applying the statutory test itself to the present case, the service of Burton at the time of his injury is remote to the actual movement of the interstate commerce business of the railroad. *Such interstate commerce was moving without present assistance from Burton. No interstate commerce was waiting upon Burton's actions for forwarding.*

Taking up the third authority upon which we rely, *Payne vs. Industrial Accident Commission*, not yet officially reported, 192 Pac. 859, in which *petition for certiorari filed by counsel for the railroad was denied by this court on January 17th of this year*, we contend that this case supports the rule here contended for. The California court said in this connection:

"Applying these principles to the facts herein, we think that, at the time Brizzolara received the injury which caused his death he was not engaged in interstate commerce. The engine which he was

repairing was not used exclusively in such commerce. Indeed, as was said in the Winters case, *'an engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined to anything more definite than such business as it might be needed for.'* *It had been withdrawn from all traffic.* To paraphrase the language of the Harrington case, *it is not important whether the engine had previously been engaged in interstate commerce or that it was contemplated that it would be so engaged after this immediate duty had been performed.* And this further excerpt from the opinion in the Winters case is pertinent: *'Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.'* We quote from *Chicago R. I. and P. R. Co. vs. Cronin*, 176 Pac. 919 (Okla.): *'We can not agree with the plaintiff in error that this broken down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was "dead"; undergoing the repairs necessary to placing it in commerce.'* " (Italics ours.)

**ANSWER TO ATTEMPTS BELOW TO DISTINGUISH THE
PRESENT CASE.**

1. In the briefs and decision below in the present case, one attempted ground of distinction between the present case and the three principal cases cited above, was that the engine in the present case was claimed to have been permanently and exclusively devoted to interstate commerce while in service, while in the three cases cited, the engine was used for mov-

ing both interstate and intrastate commerce while in service. In the next main division of this brief we will show that the engine in the present case was not wholly employed in interstate commerce while in service. As to its legal effect, we here claim that it is immaterial whether the engine was or was not engaged exclusively in interstate commerce during its prior service. At the time of the injury sustained by Burton, the engine was not engaged in any kind of commerce.

“An engine as such is not permanently devoted to any kind of traffic * * *” (*Winters case, supra*). With the possible exception of an engine which is so constructed that it is incapable of being used in local commerce, which if it can exist, is not claimed to have been the case here, any engine is capable of assignment or transfer from one kind of service to another, as the business of the railroad may require. An *irrevocable* assignment to interstate commerce alone, is legally, and as a matter of fact, impossible. If the engine while in use was not *irrevocably* assigned to a particular service, it was not permanently so assigned.

Confusion has arisen upon this matter of “permanent and exclusive devotion to interstate commerce,” because of a misunderstanding by inferior courts of the decision of this court in the Pedersen case (*Pedersen vs. Del. L. & W. R. Co.*, 229 U. S. 146). In that case, the first case involving repairs to bridges and roadbed to reach this court, reference was made in general terms, to repairs to instrumen-

talities permanently devoted to interstate commerce coming within the Federal Act. The court was here speaking of repairs to a railroad bridge, a portion of the immovable equipment of a railroad, similar in character to roadbed, tracks, etc. This decision was erroneously construed by inferior courts, including the Supreme Court of California in *Southern Pacific Co. vs. Pillsbury, et al.* 170 Cal. 782, 151 Pac. 277, to include repairs to engines. This misconstruction was cleared up by this court in the *Winters* and *Branson* cases, *supra*, by which it is definitely held that engines (movable equipment) even though used in the interstate business of the railroad, are not permanent instrumentalities of interstate commerce while out of service for repairs. "This is not like the matter of repairs upon a road permanently devoted to commerce among the States." (*Winters* case, *supra*.) The Supreme Court of California has so construed the *Winters* and *Branson* cases as overruling its decision in the case immediately above referred to in the *Brizzolara* case (*Payne vs. Industrial Accident Commission*, — Cal. —, 192 Pac. 859, *certiorari* denied by this court January 17, 1921). Hence, the mere fact that the past assignment of an engine may have been wholly or nearly wholly to interstate commerce, is immaterial. The engine is still a portion of the movable equipment of the railroad, susceptible of use in either kind of business, local or interstate, and of transfer from one such use to another, as the business of the railroad may require.

In addition, the following distinctions between immovable equipment, (roadbed, tracks, bridges, etc.) and movable equipment, (rolling stock) appear:

(1) Tracks, bridges, etc., are not ordinarily out of service during repairs, but are an existing and permanent instrumentality of interstate commerce at all times, whether under repairs or not, (at least every decision in which the jurisdictional question is discussed, is one in which the instrumentality remained in service during the repairs). An engine or car, on the other hand, is taken out of commission and service when undergoing extensive repairs, and is then even more out of service in interstate commerce than while carrying local commerce solely, in which latter case it is not within the federal act, *Illinois Central R. Co. vs. Behrens*, 233 U. S. 473. The dedication of a track to interstate commerce is, therefore, permanent, but that of rolling stock occasional only, and not at all when the object is not in use in transporting commerce.

(2) It is physically impossible to segregate portions of the track of an interstate carrier into interstate and local parts either temporally or geographically. Interstate, mixed, and local trains move over the whole track every day, and no particular stretch of track can be said to be solely in one kind of commerce at one time, or solely in another kind of commerce at another time. All engines, on the other hand, are capable of and do propel interstate commerce solely at some times, intrastate solely at others, and mixed trains at others. This court has recog-

nized such different character at different times of train crews and cars for the purposes of jurisdiction, depending upon the kind of commerce being transported at the moment, *Illinois Central R. Co. vs. Behrens, supra*.

2. A second suggested differentiation is that the engine in this case crossed a state line on its run from one end of the railroad division to the other. This appears as a salient fact in the case, but was not referred to by the lower court in its opinion, and is in our opinion, an immaterial circumstance.

The test of jurisdiction as to a train, is the character of the commodities of commerce carried by it, not the physical movement of the train itself. *Commerce* consists in the movement of *commodities*. An engine or a train need not cross a state line to be engaged in interstate commerce, the presence of passengers or commodities on the train enroute to points in another state being sufficient. An engine running without cars at the time it crosses the state line would not be engaged in interstate commerce, or in any kind of commerce.

For instance, the Knickerbocker Express runs daily from Chicago to New York. It is no less an instrumentality of interstate commerce when crossing from one side of Indiana to the other, than while crossing from Indiana to Ohio. It retains its same character throughout. And an express train running from New York City to Albany, wholly within the state of New York, is almost always an instrumentality of interstate commerce, because almost

always it will carry one or more passengers traveling on interstate tickets, or one or more pieces of baggage, express or mail, which are being carried in the course of an interstate movement.

Hence, the crossing of the state line by the engine on its regular run in the present case, is of no jurisdictional significance.

3. The court below relied mainly in support of the decision here complained of, upon cases which have been overruled by this court and which do not sustain its decision.

The court below cited as the main authorities for its decision, the cases of *Law vs. Illinois Central R. Co.*, 208 Fed. 869, and *Northern Pacific R. Co. vs. Maerkl*, 198 Fed. 1. These are the only cases cited by the court below which involve repairs to rolling stock, and hence the only cases in point upon their facts, to the present case. Both the cases cited were decided by inferior courts prior to the decision of this court in the *Winters* and *Branson* cases, *supra*. They are inconsistent with and overruled by the latter cases, and not authority, leaving the decision below in the present case without the support of any authority closely in point upon the facts.

II.

AT THE LEAST, THE *WINTERS*, *BRANSON*, AND *BRIZZOLARA* CASES, *SUPRA*, STAND FOR THE PROPOSITION THAT THE MAKING OF REPAIRS TO AN ENGINE, ENGAGED WHILE IN SERVICE IN BOTH INTERSTATE AND INTRASTATE COMMERCE, SUCH REPAIRS BEING MADE WHILE THE ENGINE IS OUT OF COMMISSION AND NOT ENGAGED IN ANY KIND OF COMMERCE, IS NOT WITHIN THE FEDERAL ACT. IT IS OUR CONTENTION THAT THE PRESENT CASE IS SQUARELY WITHIN THIS RULE.

This brings us to a consideration of the findings and conclusions of fact and law below, as to the nature of the services performed by the engine while in service. We appreciate that this court will not review questions of fact, but relies upon the determination below for the facts. While the District Court of Appeal appears to have drawn conclusions somewhat at variance with those drawn by the *nisi prius* body, it is clear that the facts are not in dispute. We contend that upon the state of the record, the findings below which this court will accept, are in accordance with our position.

The findings of fact of the Industrial Accident Commission, the court of first instance in the present case, are, as far as relevant to the jurisdictional issue, as follows:

“1. That O. J. Burton, hereinafter called the employee, the applicant herein, was injured on the 1st day of February, 1919, at Los Angeles, California, while in the employment of defendant Walker D. Hines, as Director General of Rail-

roads, United States Railroad Administration, hereinafter called the employer, as a machinist;

2. That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to the same, and happened in the following manner: While tapping the boiler of an engine, a piece of steel lodged in his left eye, blown by the exhaust from a compressed air holder near him, where other men were at work;

9. That the engine upon which he was at work had been theretofore used in interstate commerce, but during the period from the 19th day of December, 1918, to the 21st day of February, 1919, said engine was withdrawn from any and all service for repairs, was not then an instrument of or engaged in any commerce, and the employee was not engaged in interstate commerce, and both employer and employee were subject to the compensation provisions of the Workmen's Compensation, Insurance and Safety Act and to the jurisdiction of this Commission."

The rule is well established that findings of fact may be limited to the ultimate facts, omitting recitals of subordinate evidentiary facts. Where the finding states the ultimate facts only, it is also a well established rule that all evidentiary or subordinate facts are to be taken as found, which are necessary to support the decision arrived at. If, therefore, it should be necessary to support its decision to show that the locomotive in question, while in service, was used i

both kinds of commerce, the ultimate facts found by the *nisi prius* tribunal must be taken to include such finding.

Section 67 (c) of the California Workmen's Compensation Act (chapter 586, Cal. Stats. 1917) reads in part as follows:

“(c) The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the court shall enter judgment either affirming or setting aside the order, decision or award or may remand the case for further proceedings before the commission.”

The rule is also established in California practice, construing section 67 (c) above, that a finding which is without the support of substantial evidence, is a mere conclusion of law, and therefore subject to review by the appellate courts.

Employers Liability Assurance Corp. vs. Industrial Accident Commission, 170 Cal. 800 151, Pac. 423.

In the present case, the District Court of Appeal did not purport to review or overrule the Commission's findings of fact or to set aside such findings as being without the support of evidence. The judgment of the court goes only to the annulment of

the award but does not overturn the findings of fact. The only comments made by the District Court of Appeal upon the findings of the Commission are contained in the restatement of the facts made by the court, the following being quoted from its opinion.

“On February 1, 1919, when he received the injury, Burton was engaged in repairing engine No. 3673 in the general shops of the Salt Lake Railroad at Los Angeles. While tapping the boiler of the engine, a piece of steel, blown from the exhaust of a compressed air motor operated by men working near him, lodged in his left eye, causing the injury for which he was awarded compensation. *This locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce between points in the states of Nevada and California, on the main line of the railroad.* On the 19th of December, 1918, it was placed in the shops at Los Angeles for general overhauling and the installation of a superheating apparatus to increase the steam pressure, whereupon it was the intention to return it to its regular service. It was estimated that this work would be finished about January 30, 1919, but owing to delay in delivery of necessary materials it was not actually completed until about February 21, 1919. After the repairs had been made the engine was given a trial for several days in the yards of the company at Los Angeles, in accordance with the usual custom, without cars attached. On February 25, 1919, it hauled a freight train from Los Angeles to San Pedro, and on the following day returned to Los Angeles with a similar train, a

portion of the cargo in both instances being consigned to points outside of California. It was testified that the trip to San Pedro was a part of the process of 'breaking in' after a locomotive had undergone extensive repairs. After this run to San Pedro the engine was returned to the shop, remaining there until March 4, 1919, when it was sent out attached to a through freight train, and resumed its former run between Yermo, California, and Caliente, Nevada, on the main line of the railroad, where it has ever since been used.

This rather elaborate detail seems essential to a thorough understanding of the facts, which are uncontroverted. It is conceded that if the Industrial Accident Commission of California had jurisdiction of the case, the award is just and proper in all respects.

* * * * *

Some general statements in the opinion in the Brizzolara case, *supra* might seem to be determinative of the issues here involved; but a perusal of the opinion discloses that such statements, in so far as they attempt to state the legal principles applicable to all engines, are not warranted by the decision in the Winters case, *supra*, upon which they purport to be based. The Winters case turned upon the proposition that the future use of the engine was undetermined, and that its character as an instrumentality of interstate commerce could not be made to depend upon remote possibilities or upon accidental later events. The switch engine involved in the Brizzolara case, when in service, was used in both interstate and intrastate traffic—the proportion of each not being ascertainable from the evidence.

It does not appear that it was intended for such service in the future, or that it was utilized for any purpose whatever after being repaired. The facts in the instant case are distinguishable from those in either the Winters case or the Brizzolara case. Here the engine was *permanently devoted to interstate commerce*, was destined to return to that service on completion of the necessary repairs, and was so returned when placed in condition for such use. It would seem that the length of time it was out of commission is immaterial, so long as it was the intention to maintain its character as an instrumentality of interstate commerce. As stated in the Parker case, *supra*, 'the purpose controls, and the business is interstate.' Its future use was not dependent upon 'remote probabilities or accidental later events,' but, so far as purpose and intention are concerned, its continued use in interstate traffic was as certain as anything in human affairs can be predetermined.

(1) In the light of the decisions, we conclude that, at the time of the accident, Burton was engaged in work so intimately connected with interstate commerce as practically to be a part of it, and therefore, that the Industrial Accident Commission of California had no jurisdiction.

Award annulled."

The evidentiary facts being uncontroverted, may be here summarized, not to contradict the findings but to supplement them, as the District Court of Appeal did. The record shows that the engine in question, while in service, was regularly assigned to and used upon the through freight service of a railroad division, of which the eastern terminal was in

the state of Nevada and the western terminal in the State of California. It regularly hauled through freight trains from one end to the other of this division. There was also a local freight train run upon the same division, which, while going west, picked up cars at way stations which were bound to points beyond the division, and hauled them to the end of the division, at which point they were put into the next through freight train. Necessarily, such local freight on its west bound trip would pick up cars at way stations in California which were consigned to destinations in California, and hence were in intrastate service. The engine upon which Burton was injured may have been used at times on this local service (Rec. p. 114). Furthermore, this engine on February 25, 1919, when released from the shops temporarily, hauled freight from Los Angeles, California, to San Pedro, California, containing both interstate and intrastate cars, and on the next day made a return trip between the same points, similarly hauling both kinds of commerce. When finally released from the shops on March 4th, the engine started east from Los Angeles with a through freight. The record fails to show whether said train consisted solely of interstate cars or included local cars bound for points outside the first division.

The foregoing facts constitute all the facts in the record. They should be considered in connection with the rule of law, that where a railroad is sued under the state law and seeks to evade the jurisdiction of the tribunal by pleading the federal act, the burden of

proof is upon the railroad to establish this inclusion under the federal act. If the railroad fails to establish to the reasonable satisfaction of the trier of the facts, any material fact necessary to its defense, the findings should properly be against the railroad.

Terry vs. Southern Pacific Co., 34 Cal. App. 330, 169 Pac. 86; dismissed for want of jurisdiction 249 U. S. 592.

Bradbury vs. C. R. I. & P. Ry. Co., 149 Iowa 51, 128 N. W. 1;

Di Donato vs. Phil. & R. Ry. Co., --- Pa. ---; 109 Atl. 627;

Ill. Cent. R. Co. vs. Ind. Board, 284 Ill. 267, 119 N. E. 920;

Atchison, T & S. F. Ry. Co. vs. Ind. Comm., 290 Ill. 590; 125 N. E. 380; *certiorari* denied 40 S. Ct. 393;

Polk vs. Phil. & R. Ry. Co., --- Pa. ---, 109 Atl. 627.

In the present case the railroad has failed to show that the engine was used solely and exclusively in interstate commerce, as it is a reasonable inference that the engine was used occasionally for both interstate and intrastate commerce.

The trier of the facts, having found impliedly that the engine was not used wholly in interstate commerce, and the undisputed facts being squarely in support of this finding, and the District Court of Appeal having failed to set aside those findings of fact or to intimate that said findings were not made in conformity with law, it is submitted that the official finding which this court should accept is the find-

ing that the engine was used in both kinds of commerce. At least this court should be at liberty to examine into the record to supplement the incomplete findings made below, as was done by the District Court of Appeal but with erroneous conclusions of law upon the undisputed facts.

The statements of the court below are, in the last analysis, conclusions of law and not findings of the facts. The mere fact that the District Court of Appeal restated all of the facts independently of the Commission's findings (the District court of Appeal having no authority under the law to substitute its own findings of fact for those of the Commission because of the provision of section 67*c* of the Workmen's Compensation Act quoted above), should not prevent this matter from being considered upon its merits.

Close scrutiny of the opinion below renders it doubtful that the court intended to draw any conclusions of fact contrary to the findings of fact of the Commission, express or implied. The court does not squarely state as a fact that the engine was used wholly and solely in interstate commerce throughout. It states merely that "this locomotive had been used several months for the exclusive purpose of hauling heavy freight trains in interstate commerce * * *." This is substantially correct, and yet upon the facts stated above, does not warrant the conclusion that the engine was permanently and exclusively devoted to interstate commerce, if such a thing be possible. Reference to "several months" means an exclusive use for a short period only, which is not a permanent

dedication. And in the last paragraph of its opinion, the court states merely that "here the engine was permanently devoted to interstate commerce * * *." This is a mere conclusion of law, not a recital of the facts, and therefore subject to review by this court.

III.

WE URGE THIS COURT TO ANNOUNCE A CLEAR-CUT RULE FOR DETERMINING JURISDICTION IN CASES OF INJURIES TO RAILROAD SHOPMEN WORKING UPON ROLLING STOCK WITHDRAWN FROM SERVICE. RAILROAD SHOPMEN FORM A DISTINCT GROUP OF RAILROAD EMPLOYEES AS TO JURISDICTIONAL REQUIREMENTS, AND SHOULD BE CONSIDERED, TO SOME EXTENT, WITH REFERENCE TO THEIR OWN NECESSITIES AND POSITION WITHOUT SUCH CLEAR-CUT RULE, INFERIOR COURTS CAN NOT, WITH ASSURANCE, DETERMINE WHICH LAW TO APPLY IN LITIGATED CASES, AND MUCH HARDSHIP AND UNNECESSARY LITIGATION RESULTS. WE CONTEND THAT THE ONLY PRACTICABLE TEST IN REPAIR SHOP CASES IS THAT DEPENDENT UPON WHETHER THE ENGINE OR CAR IS WITHDRAWN FROM SERVICE, AS DISTINGUISHED FROM BEING MERELY INTERRUPTED FOR REPAIR DURING THE COURSE OF AN INTERSTATE HAUL, TO GO ON AFTER THE REPAIR. ANY DISTINCTION BASED UPON THE CHARACTER OF USE OF THE ENGINE OR CAR WHILE IN USE, IS CONTRARY TO THE PURPOSE OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND INCAPABLE OF PRACTICAL APPLICATION TO INJURIES SUSTAINED BY REPAIR SHOP MEN. TO WHOM ALL ROLLING STOCK IN THE REPAIR SHOP IS ALIKE. AS TO JURISDICTIONAL QUESTIONS.

In our brief to this court in the *Brizzolara* case, *supra*, we urged the necessity for the adoption of a workable rule in the following language:

"We urge upon the court the necessity of a workable rule, in repair cases, to determine whether cases fall within the federal or state act. Litigants should be able to determine, with some certainty, which law to sue under. Inferior tribunals should have a definite and authoritative test by which to determine this question. Men are being hurt constantly in railroad repair cases. There is much confusion as to their rights. Counsel are unable to advise definitely, or lower courts to decide with assurance, and much hardship and increase in litigation is the result. As a practicable matter, any test of jurisdiction in repair cases should, therefore, be workable, *i. e.*, one which counsel and inferior courts can apply with assurance, and tend towards the elimination of appeals on the jurisdictional question and loss of rights by bringing suits in the wrong forum.

We respectfully submit that the test we here contend for, and which we understand the *Winters* and *Branson* cases to adopt, is workable, susceptible of application without controversies and appeals, and is sound upon principle. This test is that all repairs upon rolling stock while withdrawn from service (other than snow plows at least) fall under state laws. We further respectfully submit that the proposed bases of differentiation submitted by petitioner between the *Winters* and *Branson* cases and the present, are unworkable, incapable of application, unsound and would increase rather than diminish the difficul-

ties of inferior tribunals and litigants in determining jurisdiction in repair cases.”

It is an absurdity to require a workman in a repair shop to know or to ascertain at his peril, the past history and character of service of every engine or car which enters the shop for repairs. It is impossible for a shop employee to procure such information. An engine in a repair shop does not bear stamped upon it, a history of the nature and character of its past service. Neither can it be determined from an inspection of the engine to what division and service it is to be assigned upon leaving the repair shop. This information is in the possession of the railroad and inaccessible to shop employees contemplating bringing suits against the railroad company. As a test of jurisdiction, such previous service is impracticable.

Looking at the physical situation of shop employees, no principle of logic, expediency, or public policy, justifies a change in the *lex* with each engine or car which comes into the shop. The rights of shop employees should be based upon the character of their own work, not upon an accidental factor which is of no significance to them. In the repair shop all engines and cars stand alike.

As a practical matter, the repair of one engine or car while withdrawn from service is no more closely related to the immediate movement of commerce, interstate or local, than the repair of any other engine or car. All repair shop men should be treated alike for the purposes of jurisdiction.

Testing the different jurisdictional tests suggested by the letter and spirit of the Federal Employers' Liability Act, no reason appears for applying any other rule than that based upon the character of service of the engine or car *at the moment of the injury*. Such is the test prescribed by the letter of the act, which confers rights upon employees of interstate railroads only where injured *while engaged in interstate commerce*. Such is the test applied by this court to the switching of loaded freight cars. (*Ill Cent. R. Co. vs. Behrens*, 233 U. S.

~~412~~) It is equally applicable to repair cases. If the engine or car is in service in interstate commerce ~~at the~~ moment of the injury to the repair man, or where it is interrupted for repairs during the course of an interstate haul, to go on when the repairing is completed (*Winters case, supra*) the repair service is within the federal act. If the car is not loaded or not enroute empty to another state or if the engine or car is withdrawn from service and sent to the shops for extended repairs, it is not in commerce of any kind at the time, and the repair service is not under the federal act. Such repair service is remote to the movement of interstate commerce. (Authorities cited in memorandum opinion in *Branson case, supra*.) The interstate commerce business of the railroad is going forward without present assistance from the repairman. (*Hudson & M. R. Co. vs. Iorio*, [U. S. Cir. Ct. of App.] 239 Fed. 855.)

We respectfully submit that the only jurisdictional test which fits the circumstances of repair shop work

and provides a clear and workable line of distinction between federal and state jurisdiction, convenient both to railroads and their shop workers, and which can be applied with assurance by inferior tribunals to the reduction of appeals and litigation upon jurisdictional grounds, is one based solely upon whether the engine or car is out of service at the time of the repairs, as distinguished from being repaired in the course of an interstate haul, regardless of the character of use of such engine or car while in service.

IV.

THE PRESENT CASE IS ANALOGOUS TO THAT OF NEW CONSTRUCTION OF TRACK OR ROLLING STOCK, HELD IN *RAYMOND vs. C. M. AND ST. P. R. CO.*, 243 U. S. 43, TO BE GOVERNED BY STATE LAW.

The locomotive in the present case was in the repair shops for several months for extensive overhauling and repairs, as well as for installation of new equipment. It was dismantled while in the shop. The new equipment to be added consisted of a superheating apparatus to increase steam pressure and in other miscellaneous additions.

It has been held by this court that the original construction of a tunnel or roadbed is not governed by the federal act. The object does not become an instrumentality of interstate commerce until put into use in carrying commerce.

Raymond vs. C. M. & St. P. R. Co., 243 U. S. 43. The same is necessarily true of new construction of engines and cars.

By analogy the same rule should apply here. The overhauling and installation of new equipment was of so extensive a character as to invoke the same principle. While dismantled the engine was of no greater service to interstate commerce than if it were being newly built. As a present assistance in interstate commerce it falls within the principle of the *Raymond* case.

We therefore urge upon this court the granting of a writ of *certiorari* in this case to review the decision of the District Court of Appeal of California for the following reasons of public policy, as well as to accomplish justice in the particular case:

1. To clear the *Winters* and *Branson* cases, *supra*, of the ambiguity now existing, as to whether there is a distinction between engines engaged wholly in interstate commerce prior to being taken out of service for repairs, and engines engaged indiscriminately in interstate and intrastate commerce.
2. To establish a rule of jurisdiction to clearly fix the status of railroad shop employees, so that lower tribunals may act with assurance in determining jurisdiction.
3. To establish the rule beyond question, that all rolling stock while definitely out of service for a considerable period for repairs, is out from under the Federal Employers' Liability Act, regardless of

the character of use of the rolling stock while in service.

4. To do justice in the particular case.

Respectfully submitted.

WARREN H. PILLSBURY,
*Counsel for Petitioners Industrial
Accident Commission of the State
of California and O. J. Burton.*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

No.-----

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, AS AGENT
UNDER SECTION 206, TRANSPORTATION ACT,
1920 (LOS ANGELES AND SALT LAKE RAILWAY COMPANY),

Respondent.

NOTICE OF DATE FIXED FOR SUBMISSION OF PETITION FOR WRIT OF CERTIORARI.

To John Barton Payne, as Agent under Section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Company) and to E. E. Bennett and Dana T. Smith, his attorneys in this proceeding:

GENTLEMEN: Please take notice that the petitioners in the above entitled proceeding have fixed Monday, the seventh day of March, 1921, as the date for

submission of their petition for *certiorari* in the above entitled proceeding, brought to review a decision of the District Court of Appeal of the State of California, Second Appellate District, Division Two, in the matter there entitled *John Barton Payne, as Agent under Section 206, Transportation Act, 1920 (Los Angeles and Salt Lake Railway Company)*, Petitioner, vs. *Industrial Accident Commission and O. J. Burton*, Respondents, Civil No. 3296; and that on said date counsel for petitioner will move the Honorable Supreme Court of the United States at its courtroom at Washington, D. C., at 12 o'clock noon, or as soon thereafter as the matter can be heard, for the submission and granting of said petition.

WARREN H. PILLSBURY,
Attorney for Petitioners.

Dated at San Francisco, California, this fifth day of February, 1921.

State of California,
City and County of San Francisco. } ss.

Mildred Bird, being first duly sworn, deposes and says: That she is a clerk and stenographer in the office of the Industrial Accident Commission of the State of California, one of the petitioners herein; that the main office of such petitioner is in the city and county of San Francisco, State of California; that Warren H. Pillsbury, counsel for petitioners in this proceeding, is a member of the legal staff of said Industrial Accident Commission of the State

of California and has his office at the office of said Commission; that Messrs. E. E. Bennett and Dana T. Smith are the attorneys of record for John Barton Payne, the respondent herein, and have their offices in the city of Los Angeles, State of California; that there is a United States post office at said city of Los Angeles, with regular daily mail service between San Francisco and Los Angeles, California; that affiant on the fifth day of February, 1921, served copies of the within petition for *certiorari*, copy of opinion sought to be reviewed, brief in support of said petition, and notice of date fixed for submission of said petition for writ of *certiorari* (said date fixed for submission being March 7, 1921) in the above entitled proceeding, upon said Messrs. E. E. Bennett and Dana T. Smith, by depositing copies of the same in said United States mail properly enclosed in a sealed envelope with the postage prepaid thereon, said envelope being addressed as follows:

Messrs. E. E. BENNETT and DANA T. SMITH,
504 Pacific Electric Building,
Los Angeles, California.

(Signed) MILDRED BIRD.

Subscribed and sworn to before me this fifth day of February, 1921.

(SEAL)

C. B. SESSIONS,
Notary Public in and for the
city and county of San Fran-
cisco, State of California.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1921.

No. 224.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and O. J. BURTON,

Petitioners,

vs.

JOHN BARTON PAYNE, as Agent
under Section 206, Transportation Act,
1920 (Los Angeles and Salt Lake Railway Company),

Respondent.

PETITIONERS' REPLY BRIEF.

This reply brief will be limited to the points raised in respondent's brief. Arguments made by us in our opening brief and not directly challenged in respondent's brief, will not be repeated. In this reply we will state the exact points upon which respondent's brief takes issue with ours, briefly recapitulate our position with respect to the issues raised by respondent, and answer briefly a few matters raised in respondent's brief.

I.

**THE POINTS OF DIFFERENCE BETWEEN PETITIONERS'
AND RESPONDENT'S BRIEF.**

A. In our opening brief we made the contention, among others, that the decisions of this court in the *Winters* and other cases cited in our opening brief, pp. 17-25, require the holding that engines, cars and other ambulatory instrumentalities of commerce of a railroad are engaged in interstate commerce only when in use in such commerce, and not while removed from service for repairs, and that the character of previous or subsequent service of such engine or car is immaterial in determining jurisdiction over injuries occurring in the course of making such repairs.

B. At the least, respondent's brief concedes these decisions to establish the rule that where such locomotive or car is used in mixed interstate and intrastate commerce while in service, injuries sustained by workmen in repairing them while withdrawn from service are not within the federal act.

C. Respondent seeks to distinguish the present case from this conceded rule, by claiming that the locomotive here involved was not used in both commerces, or indiscriminately in interstate and intrastate commerce, but was instead used exclusively in interstate commerce prior to being shopped for repairs, and therefore such engine should be governed by the rules heretofore laid down by this court for repairs of track, roadbed and bridges, and

not by the rules made applicable by this court to rolling stock in the cited cases.

D. The exact point of difference raised by respondent's brief is therefore whether the nature of the use of the locomotive here involved before and after its withdrawal from service for repairs, is sufficient to differentiate it from the decisions of this court cited and whether the true test of jurisdiction is the character of the past or future service of the engine undergoing repair, or the relation of the engine to commerce at the time of the repair, *i. e.*, whether in service in commerce or not at said time.

II.

RECAPITULATION OF PETITIONERS' CONTENTIONS ON THIS POINT.

A. The Locomotive in the Present Case Was Not in Fact Used Exclusively in Interstate Commerce Prior to Its Being Shopped. It Moved Some Local Commerce as Well as Interstate During the Period in Question.

The most that appears is that for the five months before the locomotive was shopped the proportion of interstate to intrastate work had run very high. The use of the engine prior to said period of five months is unknown. It is conceded that the engine was physically susceptible of such use as the railroad might require of it at any time, interstate, intrastate or mixed. It had merely been on a run almost

wholly interstate for some months, to return prima facie to such run on the conclusion of repairs, but always subject to diversion as the exigencies of the road might require. It was not therefore *permanently* devoted to interstate commerce.

Moreover, during the five months in question it handled some intrastate commerce (as we pointed out in our opening brief, pp. 31-2, to which we refer the court), so that the difference is of degree only, the percentage of interstate commerce being higher than in most of the cases cited, but not total.

In *Chicago, R. I. & P. R. Co. vs. Cronin*, ——— Okla. ———, 176 Pac. 919 (quoted at p. 23 of our opening brief), the percentage of interstate commerce hauled by the engine while in service was as great as in the present case. In other cases cited in our brief the percentage of interstate commerce handled by the locomotive was more than half and closely approaches that of the present case.

The present case is therefore not distinguishable upon its facts from the cases cited by us.

B. The Rule Is the Same Even if the Engine Is Engaged Largely, Substantially Wholly, or Wholly in Interstate Commerce at the Time It Is Taken Out of Service. The Test Is Whether the Engine Is in Use in Interstate Commerce at the Time of the Injury or Withdrawn from Service in Any or All Commerce.

Our contention (opening brief, pp. 17-25) is that the cases cited turn upon the relation of the engine

to interstate commerce while undergoing repairs, not the character of past or future service. Where an engine is wholly withdrawn from service for repairs it is not during the period of repair an instrumentality of any kind of commerce.

The court is referred to our opening brief (pp. 11-25) for our argument upon the contention here stated.

Engines and cars are in interstate commerce only when in actual use in such commerce. We refer the court to our brief, pp. 27-29.

We would further point out that the test usually applied by this court of the interstate character of an instrumentality, is not whether *all* the work is interstate, but whether *any* is interstate. (*Pedersen vs. D. L. & W. Ry. Co.*, 229 U. S. 146, 152.) Tracks and roadbed are instrumentalities of interstate commerce if one shipment a day or one shipment a week of interstate commerce passes over them, and are not made any more so if the greater part or all of the commerce moving over them is interstate. A train is an interstate train if there is a single interstate shipment on it, and is not made any more interstate in character if the greater part or all of the commerce borne by it is interstate. Hence in the present case, if the engine in question moved *any* interstate commerce while in service, such fact is as sufficient to determine its character as if all of its work was interstate. Since respondent concedes that the federal act is inapplicable to the repair

of engines employed in mixed service, it follows that the result should be the same here. An engine is no more interstate in character where used exclusively in interstate commerce than when used in mixed service.

Fundamentally it should be borne in mind that the Federal Employers' Liability Act rests upon the constitutional power of Congress to regulate interstate and foreign commerce. The act can neither be construed to extend beyond the *regulation of interstate and foreign commerce*, nor can Congress constitutionally give to the act such effect. The regulation of the relation of employer and employee in railroad repair shops is no part of the regulation of interstate and foreign commerce. The repair of engines and cars is not commerce at all. It is so held expressly in

The First Employers' Liability Cases, 207 U. S. 463, at page 498.

III.

COMMENTS ON SPECIFIC STATEMENTS IN RESPONDENT'S BRIEF.

Answering respondent's brief (pp. 14-15), the claim is there made in general language that since engines and cars are necessary to move interstate commerce and since they require repairing, such repairs must necessarily be a part of the interstate commerce business of the railroad. The *Pedersen* case (*Pedersen vs. D. L. & W. R. R. Co.*, 229 U. S.

146) is cited in this connection. If the *Pedersen* case were intended to so hold, it has clearly been modified by this court in the *Winters* and other later cases cited by us, which differentiate engines and cars from roadbed and bridges for repair purposes. It was not so intended, however, as is shown by the following excerpt from the opinion in that case, which warrants the proposition that an instrumentality of commerce, even a track or bridge, is not within the federal act if wholly and definitely taken out of use and service during the making of alterations or repairs:

“Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and *during their use as such.*” (Italics ours.) *Pedersen vs. D. L. & W. R. R. Co.*, 229 U. S. 146, 152.

Referring to respondent's discussion of the *Winters* case (respondent's brief, pp. 17-21), we frankly concede that the language used by the court in that case is capable of a double construction. The portion of the opinion italicized in our opening brief (pp. 18-19) supports our position. Other portions of the opinion, italicized by respondent (respondent's brief, p. 18) tend to support respondent's position. We ask the court to clarify its holding in that case so that it can no longer be cited

upon both sides of the present question. We believe the true construction of the case, as indicated by the opinion as a whole, and by the tendency of the court disclosed in its later decisions cited on pages 17-18 of our opening brief, to be that the repair of an ambulatory instrumentality of railroad operation is within the federal act only where the object is engaged in interstate commerce at the time of the repair, such as "where it is interrupted in the course of an interstate haul, to go on." (*Winters* case.)

Referring to the cases cited by respondent's brief (pp. 21-22), respondent has overlooked a distinction drawn by this court between services supplying current needs of locomotives *in use*, and the repairing or overhauling of such engines while *out of use*. Acts of coaling, watering, lubricating, sanding, etc., of engines, either while such engines are on interstate runs or while they are being groomed at night between such runs, may be conceded to be services in interstate commerce, as they are all services in "keeping in usable condition" instrumentalities then in active use in interstate commerce. Acts of repair to ambulatory instrumentalities at the time withdrawn from all commerce, are very different. This distinction was pointed out by us on page 23 of our brief in quoting from *Lindway vs. Penn Co.*, ——— Penn. ———, 112 Atl. 40, in which the Supreme Court of Pennsylvania made the same differentiation.

This explanation also covers respondent's citation of *Erie R. R. Co. vs. Szary*, 253 U. S. 86 (respondent's brief, p. 29), the service of sanding engines while in use falling into the same class as coaling, watering, etc. All these are services intimately connected with train movements, not with repairs.

Referring to respondent's discussion of the *Branson* case (respondent's brief, pp. 24-5), respondent comments upon the lack of information concerning the proportion of interstate and local work of the engines and cars while in service. We think the absence of such information in the reports strongly corroborates our position. That case arose upon demurrer to the plaintiff's declaration, the declaration stating merely that the engines and cars were used in the interstate commerce business of the railroad and not disclosing any intrastate use. Upon such demurrer the court below and this court were entitled to assume, and probably did assume, that the case was the same as if such engines and cars were used *wholly* in interstate commerce. The absence of any intimation that exclusive use in interstate commerce would have altered the decision, indicates that such exclusive use, for the purpose of ruling upon the demurrer, would not have made any difference.

Referring to respondent's brief, page 31, in which our argument is commented upon that "no interstate commerce was then waiting upon Burton's action for forwarding," respondent endeavors to show that this test is overruled by the *Pedersen*

case, there cited. In the *Pedersen* case, however, the bridge under repair *was in service* at the time the repairs were being made, and hence the making of repairs was a "present assistance" to interstate commerce then moving across it. If the repairs were not made, interstate commerce would soon cease to cross the bridge. Pedersen's act in carrying bolts was expressly held by this court to be incidental to and a part of the general service of repairing the bridge. In the present case, no interstate commerce business was being done by the locomotive while undergoing repairs. Neither would any subsequent deterioration of the locomotive while in the repair shop stop the movement of any interstate commerce.

Similarly, respondent's attempted distinction (respondent's brief, pp. 34-5) of *Wright vs. Interurban Railway Company*, 179 N. W. 877, *certiorari* denied 41 Sup. Ct. Rep. 375, is ineffectual. Although the proportion of interstate commerce carried by the railroad in that case was small, the railroad *was undoubtedly an interstate road* and any cessation of electric power would cause all interstate business of the road to immediately cease. The power station was the equivalent of a locomotive, as it was the instrumentality by which commerce was moved. If the substation had been in service at the time of the alterations, the injury would have come under the federal act (*Southern Pac. Co. vs. Industrial Accident Commission*, 251 U. S. 259). The

repair of the power station was held, however, not to be within the federal act because the instrumentality was out of service at the time. Hence the case substantiates our claim that the test is whether the instrumentality is in service or out of service at the time of the repairs.

IV.

NEW CITATIONS.

The following state court decisions reported since the preparation of our opening brief, further support our claim that the test of jurisdiction in repair cases is whether the instrumentality undergoing repair is in service in interstate commerce at the time of the repairs or not.

L. & N. R. Co. vs. Pettis, 89 So. 201;

Payne vs. Wynne (Tex.), 233 S. W. 609.

Respectfully submitted.

WARREN H. PILLSBURY,
Counsel for Petitioners.

PROOF OF SERVICE.

State of California, }
City and County of San Francisco. } ss.

A. McGRATH, being first duly sworn, deposes and says:

That she is a clerk in the office of the Industrial Accident Commission of the State of California, one of the petitioners herein, and that the said petitioner and its counsel, Warren H. Pillsbury, have their office and place of business at 307 Underwood Building, San Francisco, California; that A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett are three of the attorneys of record for the respondent herein, and that they have their office and place of business at 504 Pacific Electric Building, Los Angeles, California; that Britton & Gray are also attorneys for the respondent and have their office in the Wilkins Building, Washington, D. C.; that Charles H. Bates is also attorney for the respondent and has his office in the Mills Building, Washington, D. C.; that there are United States post offices in the city of San Francisco, the city of Los Angeles and the city of Washington, with regular daily communication by mail between said cities; that on the 11th day of March, 1922, affiant served the foregoing petitioners' reply brief upon said A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett, by depositing on said date, in the United States post office at San Francisco, California, properly enclosed in a sealed

envelope, three true and correct copies of the said foregoing brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Messrs. A. S. Halsted, Fred E. Pettit, Jr., and E. E. Bennett, 504 Pacific Electric Building, Los Angeles, California"; and on the same day affiant served the said brief upon said Britton & Gray by depositing on said date, in the United States post office at San Francisco, California, properly enclosed in a sealed envelope, a true and correct copy of said brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Messrs. Britton & Gray, Wilkins Building, Washington, D. C."; and on the same day affiant served the said brief upon said Charles H. Bates by depositing on said date, in the United States post office at San Francisco, California, properly enclosed in a sealed envelope, a true and correct copy of said brief, all postage thereon being prepaid, the said envelope being addressed as follows: "Charles H. Bates, Mills Building, Washington, D. C."

A. McGRATH.

Subscribed and sworn to before me this 11th day of March, 1922.

H. L. WHITE,

Secretary Industrial Accident Commission
[SEAL] of the State of California.

**INDUSTRIAL ACCIDENT COMMISSION OF THE
STATE OF CALIFORNIA ET AL. v. DAVIS, AS
AGENT, &c. (LOS ANGELES & SALT LAKE RAIL-
WAY COMPANY).**

**CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND AP-
PELLATE DISTRICT, DIVISION TWO, OF THE STATE OF CALI-
FORNIA.**

No. 224. Submitted April 28, 1922.—Decided May 29, 1922.

An engine was sent from exclusive employment in interstate commerce to the general repair shops of the railway company, December 19th, for general overhauling, the repairs, which involved partial dismantling, were completed on the 25th of the following February, and the engine, after a trial, was returned to service, in interstate commerce a week later. *Held* that an employee, injured

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Opinion of the Court.

in the work on February 1st, was not then employed in interstate commerce, and that his action for the injury was under the state law, and not the Federal Employers' Liability Act. P. 185. *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556.

50 Cal. App. 161, reversed.

CERTIORARI to a judgment of the court below reversing, for want of jurisdiction, an award of compensation for personal injuries, made by the petitioner Commission in favor of the petitioner Burton against the respondent.

Mr. Warren H. Pillsbury for petitioners.

Mr. A. S. Halsted, *Mr. Alexander Britton* and *Mr. Charles H. Bates* for respondent. *Mr. Fred E. Pettit, Jr.*, and *Mr. E. E. Bennett* were also on the brief.

MR. JUSTICE McKENNA delivered the opinion of the court.

O. J. Burton, one of the petitioners, received injuries while working in the general repair shops of the Railway Company upon an engine that had been employed in interstate commerce and which was destined to be so employed again, and the question is whether redress for the injury must be sought through the Workmen's Compensation Act of California (c. 586, California Statutes 1917) or under the provisions of the Federal Employers' Liability Act (35 Stat. 65).

The proceedings were instituted by Burton by an application to the Industrial Accident Commission of the State which set forth the facts of his injury, and prayed compensatory relief. Payne and the Railway Company answered, setting up the defense of interstate commerce and the federal act, and that the accident was caused by Burton's misconduct. The Commission awarded relief. On petition for review by Payne and the Railway Company, the District Court of Appeal granted a certiorari and reversed the award of the Commission.

The court, after stating the facts, expressed the view that "the sole question presented for" its consideration was whether "the engine at the time of the accident, [was] engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act (35 Stat. 65)" and concluded, after a review of cases, that Burton's work was "so intimately connected with interstate commerce as practically to be a part of it, and therefore," the Commission "had no jurisdiction".

The facts are not in dispute. It was stipulated that while Burton was drilling and tapping the boiler of the engine a piece of steel lodged in his left eye; that this was in the course of his employment and caused thereby, and occurred while he was performing service growing out of and incidental to the same.

We may assume, though the fact is contested, that the engine was sent from exclusive employment in interstate commerce to the repair shops. It was sent there for general overhauling December 19, 1918, and was, to a certain extent, stripped and dismantled. It was estimated that the work upon it would be finished January 30, 1919, but it was not actually completed until February 25, 1919. The accident occurred on February 1st of that year. After the repairs were finished the engine was given a trial trip and finally put into service in interstate commerce.

For its conclusion and judgment, the court reviewed a number of cases,¹ and considered that the principle they

¹ *New York Central & Hudson River R. R. Co. v. Carr*, 238 U. S. 260; *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13; *Erie R. R. Co. v. Winfield*, 244 U. S. 170; *New York Central R. R. Co. v. Porter*, 249 U. S. 168; *Philadelphia, Baltimore & Washington R. R. Co. v. Smith*, 250 U. S. 101; *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146; *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556; *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177; *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, and some California cases and federal reports.

established was simple; that its application had been rendered difficult by diversity of decisions in the federal and state courts, and that this court had fixed no rule by which the conflict could be resolved but had remitted the decision of each case to its particular facts. Such action is not unusual, and it is not very tangible to our perception how any other can obtain when the facts in the case are in dispute. Propositions of law are easily pronounced, but when invoked, circumstances necessarily justify or repel their application in the instance and the judgment to be rendered.

And there is no relief from those conditions in the present case and our inquiry necessarily must be whether, considering the facts, the cases that have been decided have tangible concurrence enough to determine the present controversy.

We may say of them at once that a precise ruling, one that enables an instant and undisputed application, has not been attempted to be laid down. The test of the employment and the application of the Federal Employers' Liability Act (in determining its application we determine between it and the California act) is, "was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556. This test was followed in *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177, and *Southern Pacific Co. v. Industrial Accident Commission*, 251 U. S. 259.

Shanks v. Delaware, Lackawanna & Western R. R. Co. is particularly applicable to the present case. It illustrates the test by a contrast of examples and by it, and the cases that have followed it, the ruling of the District Court of Appeal must be judged. The ruling is, as we have said, that Burton's work was so near to interstate commerce as to be a part of it.

The court, we are prompted to say, had precedents in *Northern Pacific Ry. Co. v. Maerkl*, 198 Fed. 1, and *Law v. Illinois Central R. R. Co.*, 208 Fed. 869, and it was natural to regard them as persuasive as they were decisions of Circuit Courts of Appeal. Both were ably reasoned cases. They differed, however, in their facts. In the first case, Maerkl received injuries while employed as a car carpenter in repairing a refrigerator car at the railroad shops. In the second case, Law was "a boiler maker's helper" and at the time of his injury was helping to repair a freight engine, used by the railroad company in interstate commerce. It was held in both cases that the work of repair was in interstate commerce.

The facts in the *Maerkl Case*, it may be said, do not identify it with the case at bar. The refrigerator car was not intended for use in interstate commerce only. Its use was for that or "intrastate commerce as occasion might arise." The facts in the *Law Case* do identify it with the case at bar. The period of repairs in it was 21 days, and it was cited as a precedent in *Chicago, Kalamazoo & Saginaw Ry. Co. v. Kindlesparker*, 234 Fed. 1, in which the duration of repairs, also upon an engine, was 79 days. The court expressed the view that the difference between that case and the *Law Case* was "in point of time, not in principle," and that the engine at the time of the repairs was an instrument of interstate commerce, and that Kindlesparker's work "thereon was a part of such commerce." The court seems to have been of the view, and, indeed, expressed it, referring to the *Law Case*, that the test of the work was the instrument upon which it was performed, not the time of withdrawal of the instrument from use. This court reversed the case. 246 U. S. 657.

There are other federal cases in which the decisions are diverse.¹ And there are state cases of which the same comment may be made.

¹ *Hudson & Manhattan R. R. Co. v. Iorio*, 239 Fed. 855; *Director General of Railroads v. Bennett*, 268 Fed. 767.

We refrain from a review of our cases. They pronounce a test and illustrate it. We are called upon to apply it to the present controversy. The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, indeed, are necessary to it, but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act. And there is a difference in the instrumentalities. In some, the tracks, bridges and road bed and equipment in actual use, may be said to have definite character and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character according to circumstances, and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations; the relations of a work shop, its employments and employees having cause in the movements that constitute commerce but not being immediate to it.

And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case. It was placed in the shop for general repairs on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the time being nearly stripped and dismantled. "It was not interrupted in an interstate haul to be repaired and go on." *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, 356; *Chicago, Kalamazoo & Saginaw Ry. Co. v. Kindlesparker*, 246 U. S. 657.

Further discussion is unnecessary though we are besought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now. Besides, things do not have to be in broad contrast to have different practical and legal consequences. Actions take estimation from degrees and of this, life and law are replete with examples.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.